

# Reframing Redress:

## A “Social Healing Through Justice” Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives

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*One billion dollars and an apology: reparations by the United States government for 60,000 surviving Americans of Japanese ancestry imprisoned during World War II without charges, trial or evidence of necessity. Redress for lost homes, families, and freedom, for serious harm inflicted by a government on its own people on account of their race.<sup>1</sup>*

### I. INTRODUCTION

The year 2008 marks the twentieth anniversary of Japanese American internment redress under the Civil Liberties Act of 1988.<sup>2</sup> Its impact has been far-reaching.<sup>3</sup>

On an individual level, redress was cathartic for many Japanese Americans—a measure of dignity restored. Long-stigmatized with the taint of racial disloyalty, former Japanese American internees could finally talk about their trauma. One woman in her sixties recounted that she “always felt the internment was wrong, but that after being told by the military, the President and the Supreme Court that it was a necessity,” she seriously doubted herself. But now “[r]edress and reparations, and the recent successful court challenges, have freed [my] soul.”<sup>4</sup>

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1. Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT’L. L. & POL’Y 223 (1992) [hereinafter Yamamoto, *Social Meanings of Redress*].

2. Civil Liberties Act of 1988, 50 U.S.C. App. § 1989 (1988) (authorizing presidential apology, \$20,000 in individual payments and public education fund).

3. See generally Susan Kiyomi Serrano and Dale Minami, *Korematsu v. United States: A “Constant Caution” in a Time of Crisis*, 10 ASIAN L.J. 37 (2003).

4. Yamamoto, *Social Meanings of Redress*, *supra* note 1, at 227.

On a societal level, Japanese American redress provided insights into the breakdown of democratic checks and balances during national distress.<sup>5</sup> It revealed the extraordinary social cost of near-total judicial deference to executive curtailment of American civil liberties under the false mantle of national security.<sup>6</sup> As a central aspect of Asian American legal theory,<sup>7</sup> it also opened the eyes of governments and victims of injustice to the social value of government redress. Many present-day reparations or reconciliation movements in established democracies, including the United States, cite symbolic payment to Japanese Americans as a catalyst or guide.<sup>8</sup>

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5. See MITCHELL MAKI, HARRY KITANO AND MEGAN BERTHOLD, *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS ACHIEVED REDRESS* (2004) (describing the political and legal process of Japanese American redress).

6. See Serrano & Minami, *Korematsu v. United States: A "Constant Caution," supra* note 3; Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review, Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986) [hereinafter Yamamoto, *Korematsu Revisited*].

7. Asian American legal theory emerged in the 1990s as a scholarly field initially informed in part by inquiries into the legal and social impacts of 1988 Japanese American Redress and increasing Asian immigrant populations. See generally Robert Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (describing an emerging Asian American legal theory); Robert Chang and Neil Gotanda, *Afterword: The Race Question in LatCrit Theory and Asian American Jurisprudence*, 7 NEV. L.J. 1012 (2007). For Asian American legal scholarship on redress, see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933-1013 (2004) [hereinafter Kang, *Denying Prejudice*]; Natsu Taylor Saito, *At the Heart of Law: Remedies for Massive Wrongs*, 27 REV. LITIG. 281 (2008) [hereinafter Saito, *Remedies for Massive Wrongs*]; Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV. 275 (1998) [hereinafter Saito, *Justice Held Hostage*]; Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men who Took the Japanese Internment to Court*, 4 SEATTLE J.S.J. 1 (2005); Sumi Cho, *Redeeming Whiteness in the Shadow of the Internment: Earl Warren, Brown and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); Chris Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385 (1998); Eric Muller, *Apologies or Apologists? Remembering the Japanese American Internment in Wyoming*, 1 WYO. L. REV. 473 (2001); Christine Hung, *For Those Who Had No Voice: The Multifaceted Fight for Redress for the "Comfort Women,"* 15 ASIAN AM. L.J. 177 (2008); ERIC K. YAMAMOTO, MARGARET CHON, CAROL IZUMI, JERRY KANG AND FRANK WU, *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001) [hereinafter YAMAMOTO, CHON, IZUMI, KANG & WU, *RIGHTS AND REPARATION*]; Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477 (1998) [hereinafter Yamamoto, *Racial Reparations*]; Eric K. Yamamoto, *Beyond Redress: Japanese Americans' Unfinished Business*, 7 ASIAN L.J. 131 (2000) [hereinafter Yamamoto, *Beyond Redress*]; Yamamoto, *Social Meanings of Redress*, *supra* note 1; Eric K. Yamamoto, Susan Kiyomi Serrano and Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights and the War on Terror*, 101 MICH. L. REV. 1269 (2003) [hereinafter Yamamoto, Serrano, & Rodriguez, *African American Reparations*]; Eric K. Yamamoto, *Reluctant Redress: The U.S. Kidnapping and Internment of Japanese Latin Americans*, in *BREAKING THE CYCLES OF HATRED* (Martha Minow ed., 2001).

8. See Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER, RACE & JUST. 47 (1997) (identifying Japanese American Redress as a catalyst for recent reparations claims in the United States and in other established democracies) [hereinafter Yamamoto, *Race Apologies*]; see also *infra* note 75 (describing linkage of internment redress to other recent redress movements). There were important earlier redress

Indeed, redressing the deep wounds of injustice to foster healthy group relations has become an issue central to the future of civil society,<sup>9</sup> both for long-standing democracies committed to human rights and for countries transitioning from repressive regimes to democratic governance.<sup>10</sup> Whether a country heals persisting wounds is increasingly viewed as integral (1) domestically, to enable its communities to deal with pain, guilt and division linked to its past in order to live peaceably and work productively in the future,<sup>11</sup> and (2) globally, to claim legitimacy in the eyes of the world as a democracy truly committed to civil and human rights (which affects a country's standing to participate in matters of international security and responsible economic development).<sup>12</sup> Individuals, communities, and governments all have a stake in social healing.

Yet confusion permeates widely varying efforts to "heal" social wounds.<sup>13</sup> "Reparations," initially connoting healing but now denoting money payments, may have become too controversially loaded in the United States to do the needed heavy reparatory work.<sup>14</sup> And the broad

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movements that had become largely inactive until revived in the early 1990s. See ALFRED BROPHY, REPARATIONS PRO & CON (2005) [hereinafter, BROPHY, REPARATIONS PRO & CON]; CHARLES HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS 98 (2007) (the Civil Liberties Act of 1988 served as a "catalyst for renewed interest in African American reparations"). For instance, African Americans had long sought reparations for slavery and segregation, starting during the post-Civil War Reconstruction (forty acres and a mule) and continuing with litigation in the early 1900s through James Forman's famous "reparations manifesto" in 1970. *Id.* That dormant reparations movement gained new life in 1989 with Congressman John Conyers' introduction of a Slavery Study Commission bill patterned after the Japanese American Internment Study Commission. See *id.*, app. 3, at 191. Soon after World War II, Germany made substantial reparations to Jewish survivors of the Holocaust. See generally Morris Ratner & Caryn Becker, *The Legacy of Holocaust Class Action Suits: Have They Broken Ground for Other Cases of Historical Wrongs?*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 345, 346 (Michael J. Bazyler & Roger P. Alford eds., 2006). In the 1990s, new Holocaust-related reparations claims emerged for stolen art, bank accounts, and lost wages. See *id.*

9. See WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 1 (Roy L. Brooks ed., 1999); REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES (Michael T. Martin and Marilyn Yaquinto eds., 2007).

10. See generally THE HANDBOOK OF REPARATIONS (Pablo de Greif ed., 2007) (describing eleven successful reparations initiatives, including Japanese American redress, and exploring the significance of reparations for human rights violations for both established democracies and countries transitioning to democracy). For countries transitioning from repressive regimes to democracies, reparations can be integral to nation-building. Reparations that address past horrific political violence aim to repair psychological and economic damage in order to establish the legitimacy of the new regime as a democracy embracing human rights. *Id.*

11. See JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE vii (1994) (recounting studies that show that deeply-embedded discrimination creates economic and psychological damage that spans generations).

12. See Eric K. Yamamoto, Sandra Hye Yun Kim and Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 64-74 (2007) (assessing the significance of reparatory justice to a country's claim to be a democracy committed to human rights) [hereinafter Yamamoto, Kim & Holden, *American Reparations Theory and Practice*].

13. See *infra* Sections III.B and III.C.

14. See *infra* Section III.

idea of “reconciliation,” reflected in political initiatives,<sup>15</sup> is amorphous and often leaves policymakers and advocates working in the dark, without guidance or accountability.<sup>16</sup> Indeed, the discourse on Japanese American redress now tends to focus on money payment to individuals,<sup>17</sup> without close attention to the psychological import of apologies, story-telling, and symbolic gestures, or to the societal impact of public education campaigns about government accountability and reparatory action.<sup>18</sup>

This Article refines a developing Social Healing Through Justice framework for both guiding and critiquing ongoing redress efforts<sup>19</sup> in established democracies committed to civil and human rights.<sup>20</sup> It does this at a conceptual level by coalescing multidisciplinary insights into social healing. It also draws upon American and global redress initiatives and integrates into the framework evolving human rights principles to deepen the dimensions of reparatory justice for systemic harms—the psychological, economic, cultural, and institutional. At a strategic level, it explores how Social Healing Through Justice at times shapes a country’s redress efforts in light of concerns about its democratic legitimacy.

In Section IV, the Article employs the “4 R’s” of Social Healing Through Justice—recognition, responsibility, reconstruction, and reparation—to assess the United States’ stalled sixteen-year commitment to reconcile with Native Hawaiians. Similar to the United States’ recent responses to Native American justice claims,<sup>21</sup> that assessment shows initial

15. See *infra* Section III.C.

16. See *infra* Section III.C.

17. See, e.g., BROPHY, REPARATION PRO AND CON, *supra* note 8, at 3 (describing the “Civil Liberties Act, which provides compensation to Japanese Americans interned during World War II”).

18. See *infra* Section III.

19. This article treats “redress” as the umbrella concept for government and private initiatives aimed at reparatory justice—healing the continuing wounds of historic injustice. “Reparations,” now tending to emphasize money payments, and “reconciliation,” focusing generally on building new relationships, are two related, overlapping aspects of redress. See *infra* Section III.

20. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 3-4 (developing the reparatory justice framework of Social Healing Through Justice); see also *infra* note 156 (defining “established democracies”). Scholars examining reparations for African Americans have been at the forefront of advancing redress as an aspect of civil rights and equality jurisprudence. See, e.g., BROPHY, REPARATIONS PRO & CON, *supra* note 8; Charles J. Ogletree Jr., *Tulsa Reparations: The Survivors’ Story*, 24 B.C. THIRD WORLD L.J. 13 (2004); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L.J. 429 (1998); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations for African Americans*, 67 TUL. L. REV. 597 (1993); Rhonda V. Magee, *The Master’s Tools, from the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003); Yamamoto, *Racial Reparations*, *supra* note 7; see generally HARLON DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* (1995) (describing how an emphasis on healing has entered civil rights discourse).

21. See generally William C. Bradford, “*With a Very Great Blame on Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002-2003) [hereinafter Bradford, “*With a Very Great Blame on Our Hearts*”]; see also William C. Bradford, *Beyond Reparations: An American Indian Theory of Justice*, in BEPRESS LEGAL SERIES

governmental embrace of *recognition* and *responsibility*. However, particularly with the former Bush administration, the assessment also shows starkly inadequate *reconstruction* and *reparation*—incomplete if not failed efforts to heal.<sup>22</sup>

In Section V, the Article then illuminates some of the consequences of a country's incomplete or failed healing efforts—the continuing pain, dislocation, and social divisions. It also offers insight into how international scrutiny of a government's human rights record can reinvigorate domestic redress initiatives. It does this by employing the framework to critique Japan's recently rejuvenated efforts to redress the long-standing harms to the indigenous Ainu in the face of sharp international criticism about Japan's unredressed historic injustices.<sup>23</sup>

The Social Healing Through Justice analysis of the United States-Native Hawaiian (domestic) and Japan-Ainu (international) initiatives sheds light on redress efforts in four ways. First, it highlights the inadequacy of governmental efforts to repair long-term systemic damage when those efforts focus mainly on “compensation,” without attention to the psychological, cultural, and institutional aspects of reparatory justice.<sup>24</sup> Second, it reveals the salutary potential of social healing efforts as well as the emptiness of insincere apologies and unfulfilled promises of repair.<sup>25</sup> Third, it offers strategic insight into how a country's geopolitical concerns about perceived legitimacy as a democracy committed to civil and human rights influence the country's future reparatory actions.<sup>26</sup> And finally, it underscores the need for the continuing development of a workable framework for guiding and assessing redress initiatives.

The stakes are high. The time is ripe to grapple with reparatory justice and reframe redress.

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(2004) (Paper 170).

22. The Social Healing Through Justice framework entails inquiry into recognition, responsibility, reconstruction, and reparation. See *infra* Section III.C.

23. See *infra* Section V. Until the mid-1990s, the Japanese government attempted to ignore the ways that its colonization of Hokkaido harmed the indigenous Ainu there. “Japanese government officials brushed the Ainu people into history’s dustbin.” Mark Levin, *Essential Commodities and Racial Justice: Using Constitutional Protection of Japan’s Indigenous Ainu People to Inform Understandings of the United States and Japan*, 33 NYU J. INT’L LAW AND POL. 419, 439-441 (2001) [hereinafter Levin, *Essential Commodities*]. In addition, the early scholars and mass media that *did* focus on the Ainu situation mainly referred to the Ainu people as a dying race that was “doomed to extinction from the face of the Earth.” *Id.* at 438 n.70; RICHARD SIDDLE, *RACE, RESISTANCE AND THE AINU OF JAPAN* 77-85 (1996).

24. See *infra* Section VI (discussing Japan’s incomplete reparatory efforts).

25. See *infra* Sections IV and V.

26. See *infra* Section V.

## II. JAPANESE AMERICAN REDRESS:

## A FOUNDATION FOR RECENT REPARATIONS AND RECONCILIATION INITIATIVES

As developed in later sections, reparations theory and practice now stand at a crossroads,<sup>27</sup> and reconciliation's bright promise of social healing has evolved into a mid-life crisis.<sup>28</sup> Yet, demands for varying forms of redress persist. In order to chart a path forward by unraveling the complexities of reparatory initiatives, we begin with a brief foundational account of Japanese American redress. We do not detail the internment<sup>29</sup>

27. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 1.

28. See *infra* Section III.C.

29. In brief, as a prelude to the internment, federal and state governments on the West Coast stereotyped and discriminated against Asians in America from the mid-1800s through the 1940s. See JUAN F. PEREA, ET AL., RACE AND RACES CASES AND RESOURCES FOR A DIVERSE AMERICA 427-40 (2001). The Chinese Exclusion Act of 1882 banned all Chinese from entry into the U.S. and forbade federal and state courts from granting citizenship to Chinese nationals. See *id.* at 383. States, such as California, forbade Asian farmers from owning agricultural lands through the California Alien Land Law and banned Chinese from employment by government and businesses. *Id.* at 398-400; see also Keith Aoki, *No Right to Own?: The Early Twentieth Century Alien Land Law As a Prelude to the Internment*, 40 B.C. L. REV. 371 (1998); FRANK WU, YELLOW – RACE IN AMERICAN BEYOND BLACK AND WHITE (2002) [hereinafter WU, YELLOW]; Gabriel Chin, *Unexplainable on Grounds of Race: Doubts About Yick Wo*, U. ILL. L. REV. 1359 (2008); Eric K. Yamamoto and Geoff Sogi, *Korematsu v. United States*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (2008). At the peak of “yellow peril” fear, racist groups, such as the Native Sons of the Golden West and the Japanese and Korean Exclusion League, fought to exclude Asians from all facets of economic and social life. See Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, U. HAW. L. REV. 649 (1997); see also PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 37 (1982) [hereinafter REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS].

Following Japan's attack on Pearl Harbor in 1941, this anti-Asian sentiment erupted. YAMAMOTO, CHON, IZUMI, KANG & WU, RACE, RIGHTS, AND REPARATION, *supra* note 7, at 96-100. Journalists and politicians scapegoated an entire race of citizens and immigrants. Yamamoto & Sogi, *Korematsu v. United States*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES (2008). California's governor and attorney general (Earl Warren) “took up the familiar anti-Japanese cry.” REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, at 5. On February 19, 1942, facing public fear of a West Coast attack, President Franklin Delano Roosevelt issued Executive Order 9066, which gave carte blanche to the military to impose civilian restrictions to prevent espionage and sabotage. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); see generally GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE-AMERICANS (2001). The Order effectively branded all Americans of Japanese ancestry as national security threats and authorized their mass incarceration. In March of 1942, Congress enacted Public Law 503, which criminalized any violation of military orders. Act of Mar. 21, 1843, Pub. L. No. 77-503, 56 Stat. 173 (1942); see Grossman, *The Japanese American Cases*.

Subsequently, Lieutenant General John L. DeWitt, head of Western Defense Command and an early advocate for the internment, issued racial curfew and exclusion orders. Eric K. Yamamoto & Liann Ebesugawa, *Report on Redress: The Japanese American Internment*, in THE HANDBOOK OF REPARATIONS, 257-283 (Pablo de Greif ed., 2007). DeWitt's orders made no distinction between Japanese nationals and American citizens of Japanese ancestry. REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 65-66 (1982). He announced that the “Japanese are an enemy race” and notwithstanding American citizenship, the “racial strains are

or the legal challenges during World War II<sup>30</sup>—many have already done so.<sup>31</sup> Rather, we focus on the redress movement and the political and legal ways it contributed to contemporary understandings of reparatory justice.

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undiluted” – “a Jap is a Jap.” YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 99; *see also* Bannai, *supra* note 7; Serrano & Minami, *Korematsu v. United States: A “Constant Caution,” supra* note 3.

Without individual charges or hearings to determine disloyalty, DeWitt’s orders forced over 120,000 persons of Japanese ancestry (including 70,000 U.S. citizens) into desolate barbed wire prisons throughout the western states (two in California, Arkansas, and Arizona and one in Idaho, Wyoming, Utah, and Colorado). Sandra Taylor, *The Internment of Americans of Japanese Ancestry*, in WHEN SORRY ISN’T ENOUGH, *supra* note 9, at 166-67. These sites, euphemistically called “camps,” were chosen for their stark remote locations. *Id.* Internees lost businesses, homes, personal belongings, and family members. *See* Yamamoto & Sogi, *supra* note 29. In contrast, despite attempts by German nationals to sabotage East Coast military facilities, individuals of German and Italian ancestry were not subjected to the same mass racial incarceration. ROGER DANIELS, CONCENTRATION CAMP, U.S.A.: JAPANESE AMERICANS AND WORLD WAR II 39 (1971).

30. In a six-to-three decision, the Supreme Court affirmed the conviction of concededly loyal Japanese American Fred Korematsu for refusing to abide by the military exclusion order. *Korematsu v. United States*, 323 U.S. 215 (1944). Gordon Hirabayashi and Minoru Yasui also challenged the curfew and exclusion orders. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943). Korematsu challenged the constitutionality of the exclusion and detention, asserting that racial incarceration violated Japanese Americans’ right to Due Process and Equal Protection under the U.S. Constitution’s Fifth Amendment. *See Korematsu*, 323 U.S. at 215; *see also* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES 93-96 (1993) [hereinafter IRONS, JUSTICE AT WAR]. The federal district court adjudged Korematsu guilty and sentenced him to a five-year probationary term. *See Korematsu v. United States*, 319 U.S. 432 (1943).

In 1944, the Supreme Court affirmed, deferring to the government’s assertion that military necessity justified the exclusion. *Id.* Justice Hugo Lafayette Black, a former Alabama Ku Klux Klan member, wrote the Court’s majority opinion. Samuel D. Thurman, Jr., Commentary, *Mr. Justice Black*, 1 STAN. L. REV. 578 (1949). Black stated that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and that courts must subject such restrictions to “the most rigid scrutiny.” *Korematsu*, 323 U.S. at 216. He also explained that “nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety” would justify racial restrictions. *Id.* at 218.

The majority, however, failed to subject the government’s racial exclusion and incarceration to the “most rigid scrutiny.” *Id.* at 215; *see* Yamamoto, *Korematsu Revisited*, *supra* note 6; Greg Robinson and Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 LAW & CONTEMP. PROBS. 29 (2005); Reggie Oh & Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves from Approving Internment of Japanese Americans to Disapproving Affirmative Action*, 1 MICH. J. RACE & L. 165 (1996). Rather, it deferred to the government’s military necessity assertion, declaring, “we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.” *Korematsu*, 323 U.S. at 217; *see infra* notes 50-62 and accompanying text (addressing the reopening of the *Korematsu* case).

31. *See, e.g.*, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 29; IRONS, JUSTICE AT WAR, *supra* note 30; ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1975); MICHIE WEGLYN, YEARS OF INFAMY (1976); YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7; Eugene Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945). For a discussion of pre-internment anti-Asian sentiment embodied in law, *see* Aoki, *supra* note 29; *see generally* WU, YELLOW, *supra* note 29; Chin, *supra* note 29.

### A. Grassroots Redress Movement

In the late 1960s, with the African American Civil Rights movement as backdrop, Japanese Americans launched a campaign of public education and legislative lobbying in support of internment reparations.<sup>32</sup> Ethnic studies programs and Asian American students' Yellow Power activism shed new light on the internment and the West Coast history of anti-Asian agitation.<sup>33</sup> In this setting the question arose: "How does a government repair serious harm it inflicts upon its own citizens, particularly when those citizens are members of a minority racial group targeted because of their race? In particular, what kinds of remedies [can be shaped] for the internment of 120,000 Japanese Americans during World War II?"<sup>34</sup> Although initially unpopular with the Japanese American community, the redress movement gradually gained support from the Japanese American Citizens League and second and third generation Japanese Americans. Hawai'i and California Asian American political leaders also played pivotal roles.<sup>35</sup> Yet without a legal foundation, the reparations movement stalled in the late 1970s. Two events in the early 1980s rejuvenated the movement.

First, with grassroots community support, Japanese American members of Congress ushered through seemingly innocuous legislation creating an internment study commission whose thorough investigation uncovered new information and provided the solid factual foundation for redress.<sup>36</sup> The Commission's 1983 Report, *Personal Justice Denied*,<sup>37</sup> recounted the first-time testimony of many internees about the trauma of race-based, indefinite, false imprisonment. It also found "a number of federal civilian and military agencies contradicting the report of General DeWitt [who issued the exclusion and internment orders] that military necessity justified exclusion and internment."<sup>38</sup> Observing that the military implemented internment orders largely after any danger of a West Coast attack had passed, the Congressional Report concluded the internment was a result of "wartime hysteria, failure of political leadership, and racial prejudice."<sup>39</sup>

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32. Yamamoto, *Social Meanings of Redress*, *supra* note 1, at 225.

33. YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 279.

34. *Id.* at 278.

35. Hawai'i Senators Daniel Inouye and Spark Matsunaga, Congresswomen Patsy Mink and Pat Saiki, and Governor George Ariyoshi provided the first strong Asian American political presence. YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 278. California Representatives Robert Matsui and Norman Mineta also played pivotal congressional roles. Leslie Hatamiya, *Institutions and Interest Groups: Understanding the Passage of the Japanese American Redress Bill*, in *WHEN SORRY ISN'T ENOUGH*, 194-96 (Roy L. Brooks ed., 1999).

36. *See id.*

37. REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 29.

38. *Id.* at 18.

39. *Id.* The Report also rejected as unfounded the government's contention that World War II



Second, also in 1983, Fred Korematsu reopened his World War II exclusion case, asking the San Francisco federal district court to vacate his forty-year old conviction.<sup>40</sup> A core of a dozen volunteer lawyers, mostly young, third-generation Japanese Americans whose parents had been interned, formed the legal team.<sup>41</sup> Fifty more lawyers, students, and supporters pitched in. Raising \$50,000 through small contributions to defray litigation cost, the Korematsu *coram nobis* legal team also labored in the arena of public opinion. The lawyers spoke in schools, churches, and community halls. They also spoke on radio and appeared on local and national television.<sup>42</sup>

Korematsu's aims, they explained, were extraordinary—to overturn what the Supreme Court had validated four decades earlier and to thereby assure that “this will never happen again to any American citizen of any race, creed or color.”<sup>43</sup> The claims? Newly declassified government documents from World War II, discovered by researchers Peter Irons and Aiko Herzog-Yoshinaga, revealed three crucial facts:

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Japanese diplomatic “Magic” cables showed Japan’s successful recruitment of Japanese Americans for the war effort. *Id.* at 475; *see also* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (rejecting Magic cables argument); *cf.* MICHELLE MALKIN, IN DEFENSE OF INTERNMENT: THE CASE FOR RACIAL PROFILING IN WORLD WAR II AND THE WAR ON TERROR (2004) (arguing that the Magic cables justified the internment); LILLIAN BAKER, THE CONCENTRATION CAMP CONSPIRACY: A SECOND PEARL HARBOR (1981) (defending the internment); *but see* David Forman, *Rethinking the Wisdom of Japanese American Internment*, HONOLULU STAR-BULLETIN, Aug. 9, 2004, at A11, *available at* <http://archives.starbulletin.com/2004/08/09/editorial/commentary.html> (explaining gaps in Malkin’s factual recitations and reasoning); Fred Korematsu, *Do We Really Need to Relearn the Lessons of Japanese American Internment?*, S.F. CHRON., Sept. 16, 2004, at B9 (highlighting Malkin’s failure to acknowledge racial scapegoating during times of national fear).

40. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

41. YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 366.

42. *Id.*

43. PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 20 (1989). In his *Korematsu* dissent, Justice Murphy charged that the majority’s decision “falls into the ugly abyss of racism.” *Korematsu*, 323 U.S. at 233. According to Murphy, the majority blindly accepted as “fact” General DeWitt’s statements about Japanese American espionage and sabotage and about the lack of time to hold individual loyalty hearings. *Id.* at 241; *see* DeWitt, Final Report, Japanese Evacuation from the West Coast, 1942 [hereinafter Final Report], *reprinted in* Korematsu Petition for Writ of Error *Coram Nobis*, filed with the U.S. District Court for the Northern District of California, January 19, 1983 (No. CR-2763W) [hereinafter *Korematsu Coram Nobis* Petition].

Murphy also dismantled the government’s cultural contentions about inherent Japanese American disloyalty, finding the government’s assertions to be “largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.” *Korematsu*, 323 U.S. at 239. Murphy concluded that the “forced exclusion was the result of . . . the erroneous assumption of racial guilt rather than bona fide military necessity. . . . I dissent, therefore, from this legalization of racism.” *Id.* at 235-41.

1. Before the internment, all involved governmental intelligence services informed the highest officials of the military and War and Justice Departments that West Coast Japanese Americans posed no serious danger, and there was no justification for internment;<sup>44</sup>
2. General DeWitt based his internment decision on racial stereotypes of "inherently disloyal" Japanese Americans;<sup>45</sup> and
3. The military and War and Justice Departments concealed, altered, and destroyed crucial evidence and deliberately misled the U.S. Supreme Court in 1944 when it considered Korematsu's case and accepted as true the government contention of military necessity.<sup>46</sup>

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44. All of the American intelligence services investigating possible disloyalty by Japanese Americans directly contradicted DeWitt's Report. YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 290. The Office of Naval Intelligence (ONI) reported after the Pearl Harbor attack that "Japanese Americans posed little danger to military security . . . and that most of those persons 'are either already in custodial detention or are members of . . . groups already fairly well known' to the ONI or FBI." K.D. Ringle, Lieutenant Commander, U.S. Department of Navy Office of Naval Intelligence, Report on Japanese Question (Jan. 26, 1942) *reprinted in* YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 300.

The FBI rejected as unfounded alleged instances of espionage and sabotage cited by DeWitt and concluded that the mass internment plan was based on "public and political pressure rather than on factual data." Memorandum, J. Edgar Hoover, Director, Federal Bureau of Investigation (Feb. 2, 1942), *reprinted in* REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 29. The Federal Communications Commission also rejected DeWitt's assertion that Japanese Americans engaged in radio signaling to Japanese forces. Memorandum, James Fly, Commissioner, Federal Communications Commission (Apr. 4, 1944) *reprinted in* YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 303. These memorandums were exhibits to the Korematsu *Coram Nobis* Petition. Korematsu *Coram Nobis* Petition, *supra* note 43; *see generally* IRONS, JUSTICE AT WAR, *supra* note 30 (analyzing World War II government documents undercutting the government's claim of "military necessity").

45. DeWitt's Final Report asserted the mass racial internment was justified because "there was evidence of disloyalty on the part of some" and "the need for action was great, and time was short." Final Report, *supra* note 43. These pivotal "facts" were false, and recently discovered government documents showed that General DeWitt and high-level Justice and War Department officials knew this, suppressed the truth, and deliberately destroyed key evidence to mislead the Supreme Court. *See supra* note 5.

In fact, Japanese Americans had not committed espionage or sabotage, and the government had ample time to hold individual hearings. *Korematsu*, 323 U.S. at 223-24. There was no "military necessity." *See* REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 29, at 5-8. The American Intelligence Services directly and forcefully recited these factual realities to DeWitt before the internment and before his Report was submitted to the Supreme Court as evidence. *See infra* notes 46-47. DeWitt acknowledged in the original version of his Final Report that time was not a factor—the government, he said, due to Japanese American racial characteristics, simply could never "separate the sheep from the goats." *Hirabayashi*, 828 F.2d at 598. This original version directly contradicted the arguments the War and Justice Departments planned to make to the Supreme Court. *Korematsu Coram Nobis* Petition, *supra* note 43, at Exhibit D. The War Department therefore forced DeWitt to alter his original Report to hide the military's actual racial reasons for the exclusion and detention. Final Report, *supra* note 43.

46. Justice and War Department officials deliberately suppressed crucial intelligence reports rejecting any factual bases for mass racial incarceration. *See* Yamamoto, *Korematsu Revisited*, *supra* note 6, at 17. Appalled by the government's unethical "suppression of evidence," the two Justice Department attorneys drafting the government's *Korematsu* legal brief attempted to alert the Supreme Court to "intentional falsehoods" in the DeWitt Report. Memorandum, Edward Ennis, Director, Alien Enemy Control Unit, U.S. Department of Justice (Sept. 30, 1944), *Korematsu Coram Nobis* Petition,

With this newly uncovered evidence, Korematsu filed his *coram nobis* petition on January 19, 1983.<sup>47</sup> The petition claimed that Korematsu's conviction in 1942 for resisting the military's internment orders and its affirmation by the Supreme Court in 1944 rested on a "long-standing, pervasive and unlawful governmental scheme designed to mislead and defraud the courts and the nation."<sup>48</sup>

Federal District Judge Marilyn Hall Patel agreed and, finding a "manifest injustice,"<sup>49</sup> vacated Korematsu's conviction. Patel first cautioned, "the judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court." In ringing oratory, reminiscent of Justice Jackson's "Loaded Weapon" dissent in *Korematsu*,<sup>50</sup> Patel then highlighted the sharp need for presidential and congressional accountability and underscored the significance of *Korematsu* to American democracy:

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*supra* note 43, at Exhibit B.

John Burling inserted a footnote into the government's draft brief to advise the Supreme Court that the Justice Department possessed clear evidence refuting the government's claims of espionage. Korematsu *Coram Nobis* Petition, *supra* note 43, at Exhibit AA. Memorandum, John Burling, Attorney, U.S. Department of Justice (Sept. 11, 1944). However, high officials in the Justice Department stopped Burling's effort and revised the footnote to hide the existence of the assessments of all involved intelligence services refuting the government's argument of military necessity. See IRONS, JUSTICE AT WAR, *supra* note 30, at 93-96, 288-92.

47. See Korematsu *Coram Nobis* Petition, *supra* note 43 (describing usage of *coram nobis*, a rare writ of error, as the procedural vehicle for reopening a criminal case where the defendant has served his sentence and where new proof has emerged establishing egregious government misconduct in the prosecution amounting to "manifest" injustice); see also Yamamoto, *Korematsu Revisited*, *supra* note 6, at 17.

48. *Id.*

49. Korematsu v. United States, 584 F.Supp. 1406 (N.D. Cal. 1984).

50. Justice Jackson's dissent prophesized the Supreme Court majority decision's long-term harm to American democracy. In upholding mass racial incarceration without credible proof of necessity, Jackson charged that the majority had established a dangerous legal principle—a "loaded weapon." *Id.* at 249.

The Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens . . . [the] principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. *Id.*

See Eric K. Yamamoto and Susan Kiyomi Serrano, *The Loaded Weapon*, 27 AMERASIA J. 51 (2002) (analyzing the import of Justice Jackson's "loaded weapon warning" for post-September 11<sup>th</sup> America); Susan Akram & Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295 (2002) (describing government scapegoating and racial profiling after the 9/11 attack); Saito, *At the Heart of Law*, *supra* note 7 (revealing government's COINTEL program's gross subversion of American Civil Liberties in the name of national security); Leti Volpp, *The Citizen as Terrorist*, 49 UCLA L. REV. 1575 (2003) (analyzing racializing of Arab Americans as foreign terrorists); Margaret Chon and Donna E. Arzt, *Walking While Muslim*, 68 J. L. & CONTEMP. PROBS. 215 (2005) [hereinafter Chon & Arzt]. A prominent commentator at the time described the *Korematsu* case, along with the *Hirabayashi* and *Yasui* cases, as a civil liberties disaster. Rostow, *The Japanese American Cases*, *supra* note 31.

As a legal precedent [Korematsu] is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears that are so easily aroused.<sup>51</sup>

In granting Korematsu's *coram nobis* petition, Patel also energized the political movement to rectify the human harms of the presidential, congressional and military actions that "caused needless suffering and shame for thousands of Americans."<sup>52</sup>

### *B. Civil Liberties Act of 1988:*

#### *Apology, Reparations and Public Education*

With the Congressional Commission's Report, the *coram nobis* court victories, and the pending *Hohri* class action lawsuit,<sup>53</sup> a renewed grassroots and legislative lobbying campaign pushed for redress. Japanese American redress received strong political support from African American, Jewish American, and other civil rights groups.<sup>54</sup> Despite strong opposition, with the support of Asian American members of Congress, the collective efforts culminated in the Civil Liberties Act of 1988. Signed by President Ronald Reagan at a time when the United States sought legitimacy as a democracy committed to civil and human rights in its fight to end the Cold War,<sup>55</sup> the Act committed the President to formally apologize for the internment, and it authorized a reparation payment of \$20,000 for each surviving internee who was a U.S. citizen or legal resident

51. *Id.* at 1420. See also RICHARD DELGADO AND JEAN STEFANCIC, JUSTICE AT WAR (2004) (analyzing post-9/11 tension between civil liberties and national security); Chon & Arzt, *supra* note 50 (describing the racial scapegoating of Arab Americans and Muslims after 9/11); Jerry Kang, *Recent Development: Thinking Through Internment: 12/7 and 9/11*, 9 ASIAN L.J. 195, 195 (2002). See also Jerry Kang, *Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases on their Sixtieth Anniversary: Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255 (2005).

52. *Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987) (vacating curfew conviction of Gordon Hirabayashi in companion *coram nobis* case); *Yasui v. United States*, 772 F. Supp. 1496 (9th Cir. 1985) (vacating conviction of Minoru Yasui in companion *coram nobis* case).

53. The *Hohri* class action lawsuit sought damages for loss of freedom and property. Although the lawsuit was dismissed for statute of limitations, its appeal put pressure on Congress regarding reparations. *Hohri v. United States*, 586 F.Supp. 769 (D.D.C. 1984), *aff'd in part and rev'd in part* 782 F.2d 227 (1986), *vacated* 482 U.S. 64 (1987), *on remand* 847 F.2d 779 (1988), *cert. denied* 488 U.S. 925 (1988).

54. See Yamamoto, *Racial Reparations*, *supra* note 7.

55. See Yamamoto, *Social Meanings of Redress*, *supra* note 1, at 231.

alien at the time of internment.<sup>56</sup> It also established an internment fund for public education.

In a letter accompanying each reparations check, President George H.W. Bush apologized:

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II. In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice.<sup>57</sup>

For many internees the American government's betrayal cut so deeply into the human spirit that this presidential apology was essential to any kind of repair. Amy Iwasaki Mass, incarcerated as a child and now a social worker, recounted the trauma:

I also loved America. I get goose bumps when I sing the Star Spangled Banner. I believed what our teachers taught regarding what a great country America is . . . . We were told that we were being put away for our own safety . . . . The pain, trauma, and stress of the incarceration experience was so overwhelming we used the psychological defense mechanism of repression, denial, and rationalization to keep us from facing the truth. The truth was that the government we trusted, the country we loved, the nation to which we had pledged loyalty had betrayed us, had turned against us.<sup>58</sup>

Japanese American redress also encompassed public education. In addition to the apology and symbolic payment, Congress created and partially financed the internment Public Education Fund.<sup>59</sup> The Fund generated fresh historical internment research, analysis of the need for governmental national security restructuring, and insight into Japanese American cultural values and practices.<sup>60</sup> It supported multiple creative and scholarly projects, including curricula for high school, undergraduate and law students, documentary films, plays, fine arts displays, and more.<sup>61</sup>

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56. See MAKI, KITANO & BERTHOLD, *supra* note 5.

57. See YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7, at 401 (quoting standard letter of apology from President Bush to former internees).

58. MAKI, KITANO & BERTHOLD, *supra* note 5, at 107.

59. See *id.* at 225-27.

60. *Id.*

61. The Fund covered seven categories of projects (curriculum, landmarks and institutions, community development, arts and media, research, national fellowships and research resources), and

For many former internees public education became an integral part of the healing process, exemplified by the Smithsonian Museum's permanent internment and redress exhibition and the national internment memorial in Washington, D.C.<sup>62</sup> According to a Japanese American observer, the Public Education Fund's impact extended far beyond the specific projects: "What was evident [from the education projects] . . . was that a great deal of personal [pain and] friction had been replaced with a sense of community accomplishment"<sup>63</sup>—an aspect of social healing.

### III. REDRESS EVOLUTION:

#### FROM REPARATIONS TO RECONCILIATION

##### *A. Reparations at the Crossroads*

Since the United States apologized to World War II Japanese American internees and made individual payments, reparations discourse and advocacy have been the refrain of the redress realm.<sup>64</sup> Many reparations movements in established democracies cite Japanese American redress—either as model or moral precedent.<sup>65</sup> Reparations claims now on

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also created a "community" of redress movement participants who convened at the 1997 "Voices of Japanese American Redress" conference. *Id.*

62. Interview with Dr. Franklin Odo, Smithsonian Museum, Washington, D.C. (Oct. 8, 2008) (observing significance of the exhibition and memorial, and public education generally, to healing for former Japanese American internees).

63. *Id.*

64. See generally YAMAMOTO, CHON, IZUMI, KANG & WU, RIGHTS AND REPARATION, *supra* note 7.

65. See, e.g., Hung, *supra* note 7, at 195-96 (discussing grassroots Asian American activism supporting WWII comfort women reparations claims against Japan which draws upon the "Asian American effort to right the wrongs of history . . . [and] obtain redress from the United States government for the injustices of World War II internment"); Zachary F. Bookman, *A Role for Courts in Reparations*, 20 NAT'L BLACK L.J. 75, 78-81 (2007) (observing that Japanese American redress is the "paradigmatic case for how reparations can be awarded through the political process based on [t]hen illicit wrongs, committed after a Federal dictate, to a [d]iscrete group of people, for a [s]et duration of time, and with a [d]emonstrable link to the present"); Maxine Burkett, *Reconciliation and Nonrepetition: A New Paradigm for African-American Reparations*, 86 OR. L. REV. 99, 137 (2007) (the "key differences between the success of the Japanese-American reparations campaign and the centuries-old failures of African-American reparations shed light on why African-Americans are uniquely locked out of reparations gains, and, at the same time, raise a red flag for the entire enterprise if it proceeds without the nonrepetition element"); Eric L. Muller, *Fixing a Hole: How the Criminal Law can Bolster Reparations Theory*, 47 B.C. L. REV. 659, 671 (2006) (the "success of the Japanese American redress movement made it a sort of 'poster child' of American reparations theory—a 'monumental,' even 'unique' political achievement that had, and continues to have, the potential to serve as a model for the redress claims of other victims of historical injustices"); Kang, *Denying Prejudice*, *supra* note 7, at 999 ("[T]he Japanese American redress movement generally has been highlighted as a critical precedent for similar redress movements, ranging from African slavery to Hawaiian self-determination"); William Bradford, *"With a Very Great Blame on Our Hearts," supra* note 21, at 9 (citing Japanese American reparations as significant for framing contemporary Native American claims); Chad W. Bryan, *Precedent for Reparations? A Look at Historical Movements for Redress and Where Awarding Reparations for Slavery Might Fit*, 54 ALA. L. REV. 599, 614-15 (2003) (proposing a reparations plan for slavery to include an apology and a public education fund patterned after the 1988 Civil Liberties

the table in the United States encompass African Americans (slavery, Jim Crow segregation, specific atrocities),<sup>66</sup> Native Americans (mismanagement of 11 million acres of trust lands),<sup>67</sup> Native Hawaiians (taking of native lands and denial of self-governance),<sup>68</sup> Japanese Latin Americans (kidnapping of Latin Americans during World War II and holding them indefinitely in U.S. internment camps as hostages),<sup>69</sup> the Latino “Bracero” itinerant farm workers (economic exploitation of invited farm workers from Mexico),<sup>70</sup> the indigenous Chamorus in the United States Territory of Guam (destruction of ancestral lands and culture),<sup>71</sup> and the Filipino U.S. World War II veterans (denial of promised full veterans benefits).<sup>72</sup> Recent international reparations claims lodged in United States courts include claims by European Holocaust survivors,<sup>73</sup> the “Korean Comfort Women,”<sup>74</sup> and the victims of political torture and murder by the former American-supported Marcos regime in the Philippines.<sup>75</sup>

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Act); Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance?*, 1 HASTINGS RACE & POVERTY L.J. 27 (2003) (examining modern reparations movements through the lens of Japanese American redress). See also Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 18-20 (the Japanese American internment “linked reparations discourse to legal and political movements in an attempt to make reparations a reality for many groups”); Yamamoto, *Racial Reparations*, *supra* note 7 (exploring ways that Japanese American redress impacts pending African American reparations claims).

66. See BROPHY, REPARATIONS PRO AND CON, *supra* note 8; REDRESS FOR HISTORICAL INJUSTICE IN THE UNITED STATES, *supra* note 9.

67. *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006) (previously *Cobell v. Norton and Cobell v. Babbitt*) (pending class action against the U.S. Department of Interior for full accounting of mismanagement of trust funds).

68. See *infra* Section IV.

69. *Mochizuki v. U.S.*, 43 Fed. Cl. 97 (1999) (class action by Japanese Latin Americans settled by some claimants for \$5,000 and a general apology). See Saito, *Justice Held Hostage*, *supra* note 7; *Japanese Peruvians Still Waiting for Their Redress*, PACIFIC CITIZEN, Aug. 15-Sept. 4, 2008, at 3.

70. See Kevin R. Johnson, *International Human Rights Class Actions: New Frontiers for Group Litigation*, 2004 MICH. ST. L. REV. 643 (2004) (describing “Bracero Program” workers’ reparations claims against the United States and Mexican governments and banks).

71. See Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, HAW. L. REV. (forthcoming 2009).

72. During World War II, the United States formally promised Filipino soldiers that if they would fight for America they would be given full veterans’ benefits. After the war, the United States reneged on the compact, and the soldiers continued to seek reparations for decades. Benefits for the remaining WWII Filipino veterans were granted in 2009. See American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115 (2009) (benefits for Filipino veterans were included in the stimulus bill after the Senate failed to act on the Filipino Veterans Equity Act). See also Filipino Veterans Equity Act of 2008, H.R. 6897, 110th Cong. (2008) (passed by House and received in Senate Sept. 23, 2008); Filipino Veterans Equity Act of 2007, S. 57, 110th Cong. (2007) (introduced to Senate Jan. 4, 2007).

73. See generally Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY (Michael J. Bazyler & Roger P. Alford eds., 2006) (claims for slave labor, bank deposits and stolen art).

74. See generally Shellie K. Park, *Broken Silence: Redressing the Mass Rape and Sexual Enslavement of Asian Women by the Japanese Government in an Appropriate Forum*, 3 ASIAN-PAC. L. & POL’Y J. 23 (2002) (still pending reparations claims by mainly Korean women forced into sexual slavery by the Japanese government and military during World War II).

75. See *In re Estate of Ferdinand Marcos, Human Rights Litigation*, 25 F.3d 1467 (9th Cir. 1994);

Yet, despite vigorous public advocacy and strong international support, recent reparations claims in American courts and legislatures have foundered.<sup>76</sup> Those claims, particularly by African Americans for the harms of slavery and legalized segregation, have encountered fierce opposition from scholars, advocacy groups, and policymakers as well as from a segment of middle-America that characterizes reparations as nothing more than a disguised unfounded quest for money.<sup>77</sup>

United States courts have blocked reparations compensation suits on procedural grounds, including lack of standing and the statute of limitations.<sup>78</sup> And even reparations supporters have expressed concern about the public narrowing of the very idea of reparations—that the concept now tends to mean individual money payments and exclude apologies, institutional restructuring, or community restoration.<sup>79</sup> Moreover, reparations programs in both established and transitioning democracies have faced challenges from within (supporters questioning whether reparations programs are actually fostering social repair)<sup>80</sup> and from without (opponents highlighting poor administration and corruption).<sup>81</sup> Touted and criticized, reparations theory and practice stand at a cross-roads.<sup>82</sup>

### B. Toward Reconciliation

For these reasons, the language of redress is shifting away from reparations and towards social healing, or what is often broadly termed reconciliation.<sup>83</sup> Indeed, with an emphasis on the individual and societal benefits of storytelling, apologies, symbolic payments, and public

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In re Estate of Ferdinand Marcos, Human Rights Litigation, 978 F.2d 493 (9th Cir. 1992) (class action in U.S. courts on behalf of Filipino victims of political torture and murder by the Ferdinand Marcos regime).

76. See BROPHY, REPARATIONS PRO AND CON, *supra* note 8, at 121-32.

77. See *id.* at 75-87 (describing strident opposition to reparations claims). See, e.g., Robert W. Tracinski, *America's "Field of Blackbirds": How the Campaign for Reparations for Slavery Perpetuates Racism*, 3 J.L. SOC'Y 145 (2002).

78. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 24-25 (describing failure of recent reparations lawsuits).

79. *Id.*

80. See *South Africa: Special Report on Democracy-Black Economic Empowerment*, UN Office for the Coordination of Humanitarian Affairs, <http://www.irinnews.org/Report.aspx?ReportId=49461>; Mamphela Ramphele, *Reconciliation Is Not Enough*, Dec. 1, 2006, [www.mg.co.za/printformat/single/2006-12-01-reconciliation-is-not-enough](http://www.mg.co.za/printformat/single/2006-12-01-reconciliation-is-not-enough); Jessica Bell, *State Ignored TRC Findings, Says Kasrils*, CAPE TIMES, Oct. 29, 2008, at 6, <http://www.capetimes.co.za/index.php?fSectionId=3531&fArticleId=vn20081029054650703C702655>.

81. See Jessica Bell, *TRC's Unanswered Questions*, CAPE TIMES, Nov. 11, 2008, at 10, [http://www.iol.co.za/general/news/newsprint.php?art\\_id=vn20081111053618446C922952&sf=](http://www.iol.co.za/general/news/newsprint.php?art_id=vn20081111053618446C922952&sf=).

82. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12.

83. *Id.* For additional reading on the subject, see THE SOCIAL PSYCHOLOGY OF INTERGROUP RECONCILIATION (Arie Nadler et al. eds., 2008), and THE POLITICS OF RECONCILIATION IN MULTICULTURAL SOCIETIES (Will Kymlicka & Bashir Bashir, eds., 2008).



education, reconciliation is high on many established democracies' political agendas.<sup>84</sup> Some reconciliation initiatives are highly structured and fully supported. Others are marked by fits and starts and reflect only partial steps. In light of myriad reconciliation efforts, we are in the midst of what some call an Age of Reconciliation.<sup>85</sup>

In 2008, for example, the U.S. Senate moved to acknowledge the nation's mistreatment of Native Americans and Native Alaskans,<sup>86</sup> and the House of Representatives apologized for the horrific harms of slavery and Jim Crow segregation.<sup>87</sup> These apologies followed in the footsteps of path-breaking apologies for slavery by the states of Florida, Maryland, North Carolina, Alabama, New Jersey and Virginia.<sup>88</sup> Virginia also expressed regret over its devastation of Native American life, land, and culture<sup>89</sup> -- strong words of remorse and expressions of desire for reconciliation.<sup>90</sup>

Private institutions in the United States are also employing the language of reconciliation. Brown University undertook a year-long public educational dialogue about its slavery roots with an eye toward racial healing<sup>91</sup> even as opponents cast the inquiry as a disguise for future reparations payments. And business giants Wachovia, Aetna, and J.P. Morgan Chase<sup>92</sup> apologized for their historical roles in the slave industry.<sup>93</sup>

84. *Id.* State trial judges and community advocates also embrace reconciliation through discussions about criminal law and healing in the language of "restorative justice." See Lucy C. Sanders, *Restorative Justice: The Attempt to Rehabilitate Criminal Offenders and Victims*, 2 CHARLESTON L. REV. 923, 924 (2008).

85. See Glenn Clifton, *The End of History and the Age of Reconciliation: Reconciliation and Time in Kojève and Levinas*, (May 27, 2005) (prepared for "Thinking the Present" graduate student conference at University of California, Berkeley). See also WHEN SORRY ISN'T ENOUGH, *supra* note 9, at 3-11 (describing an "Age of Apology").

86. See Dennis Camire, *Apologies for Past Injustices Seen as First Step*, THE HONOLULU ADVERTISER, at A5 (Aug. 20, 2008) (describing the 2008 U.S. apology for the government's "centuries-old practice of breaking treaties and forcing [native Americans] from their land, which resulted in mistreatment, death and loss of cultural identity").

87. H.R. Res. 194, 110th Cong. (2008).

88. Recently, Virginia, Maryland, North Carolina, Alabama, and New Jersey "expressed regret or apologized for slavery." Wendy Koch, *Lawmakers to Push for U.S. Apology for Slavery*, USA TODAY, Feb. 28, 2008, [http://www.usatoday.com/news/nation/2008-02-27-slavery\\_N.htm](http://www.usatoday.com/news/nation/2008-02-27-slavery_N.htm). See Virginia Senate Joint Resolution No. 332, S.J. Res. 332, 2007 Sess. (Va. 2007); Maryland Senate Joint Resolution, S.J. Res. 6, 2007 Reg. Sess. (Md. 2007); North Carolina Senate Joint Resolution 1557, S.J. Res. 1557, Sess. 2007 (N.C. 2007); Alabama House Joint Resolution 321, H.J. Res. 321, Sess. 2007 (Ala. 2007); Florida Senate Concurrent Resolution, S. Con. Res. 2930, 2008 Leg. (Fl. 2008).

89. See Virginia Senate Joint Resolution No. 332, S.J. Res. 332, 2007 Sess. (Va. 2007).

90. Although the several state apologies expressed strong remorse and expressed a desire for reconciliation, they did not commit to reparatory action. See *id.*

91. Brown University President Ruth Simmons created a committee to organize educational forums fostering historical inquiry and "provid[e] factual information and critical perspectives" that resulted in exposing information linking the University to the slave trade. See Letter from Ruth J. Simmons, President, Brown University, to Steering Committee on Slavery and Justice, Brown University, Apr. 30, 2003, available at [http://brown.edu/Research/Slavery\\_Justice/about/charge.html](http://brown.edu/Research/Slavery_Justice/about/charge.html); *Slavery, the Brown Family of Providence and Brown University*, Brown U. News Service, [http://www.brown.edu/Administration/News\\_Bureau/Info/Slavery.html](http://www.brown.edu/Administration/News_Bureau/Info/Slavery.html).

92. Wachovia apologized "to all Americans, and especially to African Americans and people of

Native Hawaiians are asserting rights to self-governance and claims to homelands taken more than a hundred years ago in the illegal U.S.-aided overthrow of the Hawaiian nation.<sup>94</sup> They are calling upon both federal and state governments to make good on their sixteen-year-long yet stalled commitment to fully reconcile with Native Hawaiians.<sup>95</sup> Indeed, in a remarkable 2008 decision, the Hawai'i Supreme Court reinforced the state's legislative commitment to reconciliation by commanding that the governor stop selling formerly native-owned lands (now held in trust by the state partially for the benefit of Native Hawaiians) until indigenous Hawaiian reparations claims to these lands are resolved politically.<sup>96</sup>

Similarly, in the former British colony of New Zealand, the Waitangi Tribunal, with an eye on reconciliation, made favorable determinations on indigenous Māori land claims,<sup>97</sup> although many of those determinations also await implementing Crown government action amid shifting political alignments.<sup>98</sup> And after years of debate about reconciliation, Australia's new prime minister recently apologized to its "stolen generations"<sup>99</sup>—thousands of aboriginal children forcibly taken by the government *en masse* from their homes and homelands, separated from their families and culture, and often violently abused in wretched schools.<sup>100</sup>

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African descent," but refused reparations. In 2002, Aetna acknowledged its role in insuring slave owners and apologized, but refused reparations because courts would not award them. J.P. Morgan also apologized for using more than ten thousand slaves as collateral for loans. See Darryl Fears, *Seeking More Than Apologies for Slavery*, WASHINGTON POST, June 20, 2005, [http://www.washingtonpost.com/wp-dyn/content/article/2005/06/19/AR2005061900694\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/19/AR2005061900694_pf.html). See also J.P. Morgan Discloses Past Links to Slavery, WASHINGTON POST, Jan. 21, 2005, at E2.

93. Only J.P. Morgan committed to reparatory action. It set up a \$5 million scholarship program for African American undergraduates from Louisiana. Ken Magill, *From J.P. Morgan Chase, an Apology and \$5 Million in Slavery Reparations*, THE SUN, Feb. 1, 2005, <http://www.nysun.com/business/from-jp-morgan-chase-an-apology-and-5-million/8580>.

94. See *infra* Section IV.

95. See *id.*

96. Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 177 P.3d 884, 902 (Haw. 2008) [hereinafter *OHA v. HCDCH*]. The United States Supreme Court reversed the state court decision, which cited both federal and state law, and remanded the case to the state court to determine whether state law alone provides independent and adequate ground for the injunction. *Hawai'i v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009).

97. See generally Joe Williams, *Truth, Reconciliation, and the Clash of Cultures in the Waitangi Tribunal*, AUSTL. & N.Z. LAW AND HISTORY E-JOURNAL 234 (2005).

98. See *id.* (describing political process for government approval of Tribunal awards).

99. Tim Johnston, *Australia Says "Sorry" to Aborigines for Mistreatment*, N.Y. TIMES, Feb. 13, 2008, available at <http://www.nytimes.com/2008/02/13/world/asia/13aborigine.html>. For the Prime Minister's apology speech, see The Australian Prime Minister's website, <http://www.pm.gov.au/node/5952> (last visited Oct. 6, 2009). See also Chris Cunneen, *Reparations, Human Rights and the Challenge of Confronting a Recalcitrant Government*, in THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW 183 (2003); Pamela O'Connor, *Reparations for Australia's Removed Aboriginal Children: Defining the Wrong*, in THIRD WORLD LEGAL STUDIES 2000-2003: INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS IN INTERNATIONAL LAW 219 (2003).

100. Indigenous groups are threatening lawsuits if government reparations are not forthcoming. See Johnston, *supra* note 99.

In the teeth of class action lawsuits and mounting political agitation, the Canadian government and churches embarked on a far more extensive program of reconciliation with Canada's stolen generation of aboriginal children.<sup>101</sup> From the late 1800s, in the name of educational assimilation, Canada's government forcibly removed aboriginal children from families and placed them in Native Residential Schools where their mother tongue was banned and physical and sexual abuse was rampant.<sup>102</sup> The Canadian government formalized its reconciliation commitment in 2005. Its initiative encompasses apologies, money payments, and the creation of a healing foundation.<sup>103</sup>

Across the Atlantic Ocean, in the language of reconciliation, former Prime Minister Tony Blair apologized for the British Empire's sponsorship of and profiting from slavery in its many colonies.<sup>104</sup> And French leaders struggled with reconciliation following eruptions over racial discrimination, particularly against African immigrants in the *banlieues*.<sup>105</sup>

Healing the deep wounds of historic injustice is a pressing issue for Asian democracies as well. In 2006, Junichiro Koizumi, then the Prime Minister of Japan, invoked the language of reconciliation to frame his

101. Twelve thousand individual claimants launched lawsuits, including two class actions, against the Canadian government and religious organizations. See also *\$2B Package Unveiled for Residential School Survivors*, CBC.CA, Nov. 23 2005, available at <http://www.tribemagazine.com/board/showthread.php?t=105565>; see also Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self Determination*, 31 AM. INDIAN L. REV. 341, 380 (2006/2007) (discussing conflicting perspectives on indigenous peoples' right to self-determination in international law) [hereinafter Miller, *Collective Discursive Democracy*]. The pressure from the Baxter Class Action resulted in the Canadian Government negotiating an Agreement in Principle, allotting \$1.9 billion to fund a four-part reparations program. See *Baxter v. Canada* (Attorney General), [2006] 83 O.R.3d 481 (Can.). See also *\$2B Package Unveiled for Residential School Survivors*, CBC.CA, Nov. 23 2005, <http://www.tribemagazine.com/board/showthread.php?t=105565>.

102. See Jennifer J. Llewellyn, *Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice*, 52 U. TORONTO L.J. 253, 255, 257 (2002). The Canadian government began to undertake reparations initiatives in 2005. See INT'L CTR. FOR TRANSITIONAL JUSTICE, *LEGACIES OF INJUSTICE IN ESTABLISHED DEMOCRACIES* 11 (2006) [hereinafter *LEGACIES OF INJUSTICE*].

103. The commencement of Canada's much-anticipated Truth and Reconciliation Commission stalled for two years because of political skirmishing. The Commission was only established in June 2008, and will operate for five years. See *TRUTH HEALING RECONCILIATION* (2008), available at <http://www.trc-cvr.ca/pdfs/20080818eng.pdf>. See *infra* note 120.

104. See Jonathan Petre, *Blair's Deep Sorrow for Slavery 'Is Not Enough,'* DAILY TELEGRAPH (London), Nov. 28, 2006, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/11/28/nslave28.xml>. See also Esther Stanford, *Reflections on a Global Reparations Conference*, NEW NATION, Aug. 14, 2006, at 8 (describing a Pan-African movement for slavery reparations from Britain and other European countries).

105. See Julie Chi-Hye Suk, *Equal By Comparison: Unsettling Assumptions of Antidiscrimination Law*, 55 AM. J. COMP. L. 295, 309 (2007) (describing race riots in France, the country's "strict adherence to race-blindness"); Jennifer Kolstee, *Time for Tough Love: How France's Lenient Illegal Immigration Policies Have Caused Economic Problems Abroad and Social Turmoil Within*, 25 PENN ST. INT'L L. REV. 317, 329, 330-35 (2006) (discussing the history of France's immigration policy and explaining how France's tension with its former African colonies has caused "French resentment" and "racism and discrimination against African immigrants").

political approach to other countries' criticism of Japan's historic human rights violations,<sup>106</sup> including Japan's denial of belated compensation to ethnic laborers coerced into service of Japanese corporations during World War II<sup>107</sup> and its still-unacknowledged military atrocities in China and Korea.<sup>108</sup> And in 2007, the U.S. House of Representatives called upon Japan's leaders to apologize to World War II Korean sex slaves and to offer them meaningful reparations.<sup>109</sup> Then there is also the longstanding but less well-known question of justice for, and reconciliation with, Japan's indigenous Ainu.<sup>110</sup>

There are many ways to view these wide-ranging post-1988 reconciliation initiatives in established democracies. What is clear is that collectively they are linked to Japanese American Redress and that they reflect only a segment of the far larger terrain of national and global reconciliation efforts.

### C. Mid-life Crisis of "Reconciliation"

What is also clear is that the very term "reconciliation" has disparate meanings and that reconciliation in practice has a mottled record. From the U.S. Congressionally-expressed commitment to reconcile with Native Hawaiians; to the path-breaking, highly structured, legislatively-mandated

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106. At the 2005 Asia-African Summit in Jakarta, which addressed multilateral efforts in solving conflicts," Prime Minister Koizumi apologized in the general language of reconciliation:

Japan, through its colonial rule and aggression, caused tremendous damage and suffering to the people of many countries, particularly to those of Asian nations. Japan squarely faces these facts of history in a spirit of humility and with a feeling of deep remorse and heartfelt apology always engraved in mind, Japan has resolutely maintained, consistently since the end of World War II, never turning into a military power but an economic power, its principle of resolving all matters by peaceful means, without recourse to the use of force. Japan once again states its resolve to contribute to the peace and prosperity of the world in the future as well, prizing the relationship of trust it enjoys with nations of the world.

See *Excerpts from Japan PM's Apology*, BBC NEWS, April 22, 2005, <http://news.bbc.co.uk/2/hi/asia-pacific/4471961.stm>. See generally Jamie Sheu, *Clash of Asia's Titans: China and Japan's Struggle for "Reconciliation"*, May 1, 2006 (unpublished seminar paper, University of Hawai'i) (on file with author) (analyzing former Prime Minister Koizumi's rhetoric of reconciliation in addressing charges of human rights violations by China). With Koizumi's apology as backdrop, Professor Zhang Lianhong, an expert on the Nanking massacre, recounted the important message of a deceased Japanese WWII soldier about a "move toward reconciliation." According to Lianhong, "[H]atred of the past is not impassable—it is possible for China and Japan to get over wartime enmity and move toward reconciliation and friendship as long as the Japanese government sincerely retrospect history." *China Focus: Nation Mourns Penitent Japanese Veteran Calling for Respect of History*, XINHUA GENERAL NEWS SERVICE, Jan. 5, 2006.

107. In 2007, Japan's Supreme Court rejected compensation claims made by former forced laborers from China against Nishimatsu Construction. See Norimitsu Onishi, *Japan Court Rules Against Sex Slaves and Laborers*, N.Y. TIMES, Apr. 28, 2007, available at [http://www.nytimes.com/2007/04/28/world/asia/28japan.html?pagewanted=1&\\_r=1](http://www.nytimes.com/2007/04/28/world/asia/28japan.html?pagewanted=1&_r=1).

108. See generally Sheu, *Clash of Asia's Titans*, *supra* note 106.

109. H.R. Res. 121, 110th Cong. (2007) (calling on the government to reverse its policy against reparations for the women forced into sexual slavery for Japanese soldiers).

110. See *infra* Section IV.

South Africa Truth and Reconciliation process;<sup>111</sup> to the genuine yet flawed Asian American and African American communities' quest for interracial rapprochement after neighborhood eruptions;<sup>112</sup> to the facile, poorly-conceived program of Sunni-Shiite reconciliation following the upsurge in violent resistance to United States occupation of Iraq<sup>113</sup>—government and groups worldwide are invoking “reconciliation” as a mantra for handling deep-seated conflict.<sup>114</sup> In one respect, this is a positive development—a discourse that embraces bridge-building and peace-making.<sup>115</sup>

Yet, as evidenced by the reconciliation efforts discussed earlier, the very concept of reconciliation is ill-defined. It can mean a highly organized formal process of truth-telling and reparation, as in South Africa,<sup>116</sup> or an apparently insincere smokescreen to hide behind-the-scenes political maneuvering, as in Nepal<sup>117</sup> and Cambodia.<sup>118</sup> Indeed, Australia's apology to its “stolen generations” has been sharply criticized by aboriginal groups angered by the government's refusal to consider reparations,<sup>119</sup> and Canada's comprehensive reconciliation initiative has been challenged as

111. See Penelope E. Andrews, *Reparations for Apartheid's Victims: The Path to Reconciliation?*, 53 DEPAUL L. REV. 1155 (2004); LYN S. GRAYBIL, TRUTH AND RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL (2002); DESMOND TUTU, WITHOUT FORGIVENESS THERE IS NO FUTURE 35 (1999); WHEN SORRY ISN'T ENOUGH, *supra* note 9, at 10-11 (describing South Africa's Truth and Reconciliation Commission).

112. See ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 52-53 (1999) [hereinafter YAMAMOTO, INTERRACIAL JUSTICE] (describing reconciliation efforts between Asian American and African Americans in neighborhoods over heated controversies involving Asian storeowners and African American residents).

113. See Joshua Partlow, *Top Iraqis Pull Back From Key U.S. Goal*, Oct. 8, 2007, WASHINGTON POST, available at [http://www.washingtonpost.com/wp-dyn/content/article/2007/10/07/AR2007100701448\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/10/07/AR2007100701448_pf.html) (“The amnesty never materialized, nor has the reconciliation.”).

114. See, e.g., Roger Cohen, *How Kofi Annan Rescued Kenya*, NEW YORK REVIEW OF BOOKS, Aug. 14, 2008, at 51 (describing international intervention and the “Kenya National Dialogue and Reconciliation” accord creating a power-sharing plan to stem tribal and class violence). See generally THE HANDBOOK OF REPARATIONS, *supra* note 10 (reviewing a wide range of international initiatives in the context of transitional justice).

115. *Id.* at 53 (analyzing the 2008 Kenyan reconciliation “model—with strong regional participation, committed leadership, prompt intervention, insistent dialogue and a more discreet if no less vital role for the West”).

116. See *supra* note 111.

117. Nepal's controversial effort to legislatively establish a Truth and Reconciliation Commission to address the decade-long violence between the former royal government and communist insurgents has been sharply criticized for, among other things, its failure to embrace international human rights standards. See AMNESTY INTERNATIONAL, NEPAL: RECONCILIATION DOES NOT MEAN IMPUNITY: A MEMORANDUM ON THE TRUTH AND RECONCILIATION COMMISSION BILL (2007), available at <http://www.amnesty.org/en/library/asset/ASA31/006/2007/en/dom-ASA310062007en.pdf>.

118. Thirty years after the Pol Pot “Killing Fields,” Cambodia's reconciliation project emerging out of the 1991 Paris Peace Agreement appears to be mired in confusion and political maneuvering. See Vannath Chea, *Reconciliation in Cambodia: Politics, Culture and Religion*, in RECONCILIATION AFTER VIOLENT CONFLICT 49-50 (David Bloomfield et al. eds., 2003), available at [http://www.idea.int/publications/reconciliation/upload/reconciliation\\_chap03cs-cambodia.pdf](http://www.idea.int/publications/reconciliation/upload/reconciliation_chap03cs-cambodia.pdf).

119. Indigenous groups are threatening lawsuits if government reparations are not forthcoming. See Johnston, *supra* note 99.

insincere in its delayed implementation.<sup>120</sup> Britain's apology for slavery and colonialism has drawn rebukes from reparations proponents because it failed to embrace meaningful acts toward reconciliation.<sup>121</sup> And the New Zealand Waitangi Tribunal's aboriginal land claims awards have been undercut by the Crown government's long delay in finally acknowledging many awards for political reasons.<sup>122</sup>

Sometimes political instability undermines even well-intentioned and soundly-organized reconciliation initiatives. In 2005, after considerable debate, the new East Timor government established a truth and reconciliation process, with an emphasis on social healing.<sup>123</sup> One of its path-breaking tenets was gender redress—to heal the wounds of sexual violence the occupying Indonesian soldiers inflicted on East Timor women.<sup>124</sup> The commission embarked on a remarkable program of psychological healing<sup>125</sup> and economic support as a foundation for rebuilding the nation as a democracy. But political instability<sup>126</sup> slowed, if not scuttled, the healing process.

The reconciliation concept's elasticity and shifting political underpinnings provide little firm guidance to even well-meaning policymakers or political organizers. Its theological roots also make it suspect to some concerned about tenets of organized religion.<sup>127</sup> Equally

120. See TRUTH HEALING RECONCILIATION, *supra* note 103. Some who suffered find the overall efforts less than sincere, orchestrated by government for its own benefit, and lacking the kind of mutual engagement necessary for genuine healing. *Id.* Following Canada, the Tasmanian government committed to reconciliation, apologizing, and authorizing individual reparations payments to its stolen generation of aboriginal children. Barbara McMahon, *Tasmania to Pay 'Stolen Generation' of Aborigines £2.2m in Reparations*, THE GUARDIAN, Jan. 23, 2008, available at <http://www.guardian.co.uk/world/2008/jan/23/australia.international>. Yet, the social and economic impacts of its promises are uncertain.

121. See Petre, *Blair's Deep Sorrow for Slavery*, *supra* note 104. See also Stanford, *Reflections on a Global Reparations Conference*, *supra* note 104, at 8 (describing a Pan-African movement for slavery reparations from Britain and other European countries).

122. See Williams, *supra* note 97 (describing political process for government approval of Tribunal awards).

123. See generally Galuh Wandita, Karen Campbell-Nelson, Manuela Leong Pereira, *Learning to Engender Reparations in Timor-Leste: Reaching Out to Female Victims*, in WHAT HAPPENED TO THE WOMEN?: GENDER AND REPARATIONS FOR HUMAN RIGHTS VIOLATIONS 290 (Ruth Rubio-Marín ed., 2006) [hereinafter Wandita, Campbell-Nelson and Pereira, *Reaching Out to Female Victims*].

124. One of the Commission's recommendations was that "at least 50% of resources in this program shall be earmarked for female beneficiaries." *Id.* at 294-96, 308.

125. The Commission proposed the following:

[A] reparations program with five guiding principles—feasibility, accessibility, empowerment, gender, and prioritization [sic] based on need—with the aim to repair, as far as possible, the damage to their [victims'] lives caused by the violations, through the delivery of social services to vulnerable victims and symbolic and collective measures to acknowledge and honor victims of past violations.

*Id.* at 308.

126. See Tim Johnston, *East Timor Declares Emergency After Attack on Leaders*, Feb. 12, 2008, N.Y. TIMES, available at <http://www.nytimes.com/2008/02/12/world/asia/12timor.html?scp=1&sq=east%20timor%20emergency&st=cse>.

127. See DONALD W. SHRIVER JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS 58 (1995).

important, the vagueness of the term reconciliation makes a commitment to reconciliation susceptible to political mischief—that is, “reconciliation” can serve as an insincere cover for indifference or continuing hostilities and power grabs.<sup>128</sup> Reconciliation policymakers, scholars, and advocates are still searching for a clear, cogent framework for guiding and assessing reconciliatory initiatives. Reconciliation is experiencing a mid-life crisis.

Yet, as developed in the following section, a reconciliation initiative in certain settings can be of considerable social value as a sometimes promising though difficult pathway to redress. What is needed, then, are the analytical concepts and language to shape and later critique reconciliation efforts, and indeed all redress initiatives, so participants and observers can know what genuine social healing looks like and how to hold accountable those who commit to it.

A simple question distills this inquiry: When are social healing efforts productive for people, institutions and society, and when are they not? Recent writings, particularly those by Professor Rebecca Tsosie, bring analytical rigor to the concept of reconciliation.<sup>129</sup> Pablo de Greif, editor of the *Handbook of Reparations*, identifies broad reparatory justice goals of recognition, civic trust and social solidarity, and examines both the psychological and social structural dimensions of healing.<sup>130</sup> Professor Yamamoto in other works suggests coalescing multi-disciplinary understandings and casting redress, and particularly reconciliation, into a potentially workable framework of “Social Healing Through Justice.”<sup>131</sup>

With this in mind, the next section summarizes and refines Social Healing Through Justice. This framework identifies social healing as the deeper aim of most redress efforts in established democracies. It posits that group healing (and healing society itself) can only occur by engaging the self-determined goals of those harmed in multi-layered efforts at achieving transformative justice.<sup>132</sup> The focus is not singularly on group psychological and spiritual health, though they are important.<sup>133</sup> It also targets social structural transformation—that is, it must affect material change in socioeconomic and political conditions.<sup>134</sup> This entails

128. See *infra* Section IV.

129. See generally Rebecca Tsosie, *Going Back to Class? The Reemergence of Class in Critical Race Theory Symposium: Essay: Engaging the Spirit of Racial Healing within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21 (2005) [hereinafter Tsosie, *Going Back to Class?*]. See also BROPHY, REPARATIONS PRO AND CON, *supra* note 8.

130. See Pablo de Greif, *Justice and Reparations*, in HANDBOOK OF REPARATIONS, *supra* note 10, at 451 (articulating goals for “massive reparations programs”).

131. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12.

132. See *id.* at 39.

133. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 19, 79 (1998).

134. *Id.* See also Jonathan R. Cohen, *Coping With Lasting Social Injustice*, 13 WASH. & LEE J. CIV. RTS. AND SOC. JUST. 259, 268-69 (2007) (“While the experience of pain is deeply personal, one of its ultimate functions is quite political”).

engagement by all sectors of society, including communities, public organizations, businesses, and governments.

The Social Healing Through Justice framework also accounts for geopolitical pressures that influence most redress initiatives.<sup>135</sup> It does this by integrating now widely acknowledged international norms of reparatory justice, particularly the principles of the United Nations “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law” and the recently-adopted “Declaration on the Rights of Indigenous Peoples.”<sup>136</sup> Finally, it accounts for political complexities, including the potential for governments or dominant groups to co-opt or distort the process—what is described as the “darkside of reparations,” or mere attempts to achieve “cheap grace.”<sup>137</sup> In short, this reframing of redress aims to deepen understandings of multi-faceted reparatory justice, particularly in established democracies, and to delineate an approach, in substance and process, to genuine social healing.

#### IV. REFRAMING REDRESS:

##### SOCIAL HEALING THROUGH JUSTICE

##### *A. Limits of Lawsuits and Court Rulings*

In the early 2000s, American reparations thinking focused on how to win reparations for African Americans in court.<sup>138</sup> It aimed to fit reparations claims for slavery and Jim Crow segregation into a narrow

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135. See generally Richard Falk, *International Law, and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS, *supra* note 10, at 478; Hung, *supra* note 7 (describing the role of international criticism in moving the Japanese government to reluctant action on “comfort women” demands for an apology and reparations); Kieran McEvoy & John Morison, *Constitutional and Institutional Dimension: Beyond the “Constitutional Movement”: Law, Transition, and Peacemaking in Northern Ireland*, 26 FORDHAM INT’L L.J. 961, 961-62 (2003) (“internationalizing” difficult issues guided the peacemaking process in Ireland and resulted in the Belfast Agreement, which in turn prompted domestic constitutional reform).

136. See Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) (initially adopted by the Human Rights Commission and the Economic and Social Council in 2005 (to which the United States was not a signatory), and adopted in 2006 by resolution of the General Assembly) [hereinafter Basic Principles and Guidelines on the Right to a Remedy and Reparation]; United Nations Declaration on the Rights of Indigenous Peoples, A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/drip.html> [hereinafter Declaration on the Rights of Indigenous Peoples].

137. See Yamamoto, *Racial Reparations*, *supra* note 7, at 483 (describing the “darker side,” or risks, of reparations process through: (1) the narrow “legal framing of reparations,” (2) the “dilemma of reparations” (opening old wounds and backlash), (3) and the “ideology of reparations” (restrictively defining who is reparations-worthy)).

138. See, e.g., *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006) (consolidated class actions against private companies involved in American slave trade for unjust enrichment); *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995) (pro se suit against United States for economic, physical and psychological harms of slavery).



framework—intentional torts such as assault and fraud and unjust enrichment.<sup>139</sup> In doing so it generated both enthusiasm and heated opposition.<sup>140</sup>

Tort law offered traditional legal language and recognizable claims. But it also equated reparations with court-awarded monetary compensation (payment of “the debt”).<sup>141</sup> This emphasis on money payments spurred technical legal defenses from government and business lawyers,<sup>142</sup> drew rebukes from conservative scholars,<sup>143</sup> and fostered skepticism from the mainstream American public.<sup>144</sup>

The recent failure of reparations lawsuits in United States courts highlighted the stark limits of this tort law money compensation model.<sup>145</sup> One consequence of this failure has been a public perception that reparations claims lack merit—that there is no “right” to reparations.<sup>146</sup> Yet stark inequalities in every facet of African American life persist and are generally traceable to slavery and segregation.<sup>147</sup> As Professor Mari Matsuda explains, the failure of reparations claims in traditional tort law does not mean that the claims lack merit as group-based rights.<sup>148</sup> The tort

139. Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 103-04, 120, 126 (2004) [hereinafter Brophy, *Reparations Talk*] (discussing the validity and limited effectiveness of “social tort” claims along with unjust enrichment).

140. See, e.g., Peter Flaherty & John Carlisle, *Nat'l Legal & Policy Ctr., The Case Against Slave Reparations* (2004), available at [http://www.nlpc.org/pdfs/Final\\_NLPC\\_Reparations.pdf](http://www.nlpc.org/pdfs/Final_NLPC_Reparations.pdf) (arguing against slave reparations as a shakedown of the American people via the courts); David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea for Blacks and Racist Too*, FRONTPAGE MAGAZINE, Jan. 3, 2001, available at <http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153>; John WcWorter, *Against Reparations*, in SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS 180 (Raymond Winbush ed., 2003).

141. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2001) (arguing reparations are owed as a moral and legal obligation).

142. Technical objections include: (a) the statute of limitations; (b) the absence of directly harmed individuals; (c) the absence of their perpetrators; (d) the lack of direct causation; (e) the ambiguity behind compensation; and (f) sovereign immunity. Matsuda, *supra* note 7, at 373-80.

143. See, e.g., Armstrong Williams, *Presumed Victims in Against Reparations*, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 180 (Raymond A. Winbush ed., 2003).

144. See, e.g., Shelby Steele, *Or A Childish Illusion of Justice?: Reparations Enshrine Victimhood, Dishonoring Our Ancestors*, NEWSWEEK, Aug. 27, 2001, at 23.

145. See Brophy, *Reparations Talk*, *supra* note 139, at 103-04, 120, 126.

146. See Yamamoto, *Racial Reparations*, *supra* note 7, at 487-88 (Some argue that “there is no need for additional reparations” because “existing civil rights laws already afford individuals equal opportunity”).

147. See Russell Sage Foundation, *Multi-City Study of Urban Inequality*, <http://www.russellsage.org/programs/recent/inequality> (last visited Oct. 6, 2009); Jewel Crawford et al., *Reparations for Health Care for African Americans: Repairing the Damage from the Legacy of Slavery*, in SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE ON REPARATIONS 251, 270-71 (Raymond A. Winbush ed., 2003); SHERILYN A. IFILL, *ON THE COURTHOUSE LAW: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY* 171 (2007) (describing the need to create a “new community” out of one “plagued by division”); MARLON RIGGS, *ETHNIC NOTIONS* (1986) (illustrating the cultural stereotypes of African Americans from the slavery through post-Civil Rights eras).

148. Matsuda, *supra* note 7, at 374, 381.

law model, with its emphasis on direct causation, is designed for situations such as a simple car accident lawsuit between two drivers involving only money damages. It does not account for systemic group-based harms over generations.<sup>149</sup> It also “misses the repairing of bodies, minds and spirits” of individuals and communities.<sup>150</sup> Moreover, lawsuits for monetary compensation elicit tepid public support at best, since they appear to be little more than one group paying another for something that happened long ago.<sup>151</sup> Indeed, scholars opposing reparations cast reparations in that narrow fashion<sup>152</sup>—only as voluntarily paid monetary compensation to specific victims—and then find few if any injustices worthy of present-day reparations.<sup>153</sup>

In response, a new generation of reparations thinking still values aspects of the legal process. It considers the legal process important as a forum for altering public consciousness.<sup>154</sup> It moves away, however, from the litigation-compensation model.<sup>155</sup> It focuses instead on ways to “repair” the deep harms to society (divisions, guilt, shame, lack of moral standing) by healing the continuing wounds of injustice.<sup>156</sup>

### B. Social Healing

This is a significant shift in American thinking about redress.<sup>157</sup> It reflects recognition of the critical importance of reshaping the public’s understanding of reparatory efforts as something more than monetary

149. See generally Verdun, *supra* note 20 (describing limitation of legal claims for reparations).

150. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 156.

151. See Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

152. *Id.* at 690-93. But see BROPHY, *REPARATIONS PRO AND CON*, *supra* note 8 (critiquing limitations of conservative theorists’ arguments against reparations).

153. See Posner & Vermeule, *supra* note 151, at 745-46. According to Posner and Vermeule, reparations “schemes” are limited to initiatives that: 1) involve an identified victim harmed by an identified perpetrator; 2) look backward, focusing on compensation for past injuries, which precludes claimants from seeking forward-looking, preventative relief; and 3) are voluntary; there is no legal compulsion to pay the money. *Id.*

Prof. Brophy criticizes the “ideological underpinnings of [Posner and Vermeule’s] framework: a skewed ahistorical view of reparations that amounts to a pre-determined indictment of all reparations claims.” Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811, 817, 820-23 (2006). “What looks at first blush like a moderate attempt to frame the issues becomes—through narrowly defining reparations, as well as through narrow construction of the connection between wrongdoers and payers—an article that inappropriately undermines reparations claims.” *Id.* at 813-14.

154. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 56 (“[R]esearch on legal consciousness suggests that ‘over time, international law norms may alter what both governmental actors and larger populations view as ‘right,’ ‘natural,’ ‘just,’ or ‘in their interest.’ Even unsuccessful litigation of redress claims can help generate new understandings of history (*recognition*), sources of group harm (*responsibility*), and remedy (*reconstruction*)”).

155. *Id.* at 31 (describing a fourth generation of reparations theory that embraces “repair” as a central tenet).

156. *Id.*

157. BROPHY, *REPARATIONS PRO AND CON*, *supra* note 8 (identifying the recent scholarly movement toward a “repair” theory of reparations).

compensation. For injured communities, it means moving policymakers and the general public toward comprehensively repairing (1) the continuing multi-faceted damage to those communities and (2) the societal damage generated by mistrust, ill-will and a failure of democracy. All sides must realize that mutual commitment is needed to generate productive relations through acts of justice and that the joint effort, though onerous, is worth the investment.<sup>158</sup>

The Social Healing Through Justice framework targets scholars, government policymakers, and justice advocates engaged in reparatory initiatives.<sup>159</sup> It is both theoretical (emerging at the intersection of several scholarly disciplines), and practical (addressing what might be strategically deployed in real life justice struggles).<sup>160</sup> Its purpose is to enable interested groups and governments both to guide and to assess their present-day efforts toward the kind of transformative justice that promotes social healing.

Aspects of prophetic theology, social psychology, sociolegal studies, political theory (peace studies), economics, and indigenous healing

158. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 41.

159. Established democracies are those marked by democratic governance and a commitment to civil and human rights. Governmental abuses of power and systemic subordination of vulnerable groups expose those democracies to legal and moral claims for redress—for the society to be held accountable according to its commitments. Countries transitioning from repressive regimes to democracies are differently situated in terms of repairing the damage of past regimes. See Arturo Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in HANDBOOK OF REPARATIONS, *supra* note 10, at 504 (defining transitional justice as the, “conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoing of repressive predecessor regimes”). Reparations programs are often linked to criminal prosecutions of prior leaders for mass violence in response to public demands for retribution and to reinstate the “rule of law.” *Id.*, at 505 (describing the sometimes “problematic” pursuit of criminal accountability in transitioning countries). In this setting, “healing” approaches aimed primarily at establishing new productive relationships between aggressors and victims will likely be unproductive. *Id.*

160. See *infra* Section III.C. The proffered framework is one approach to addressing the social problem of persisting damage from social injustice. Conceptually, the approach is situated between the poles described by Martha Minow as “vengeance” (retribution) and “forgiveness” (acceptance). See MINOW, *supra* note 133. It seeks to integrate disciplinary insights into the healing of individuals with the insights into the repair of damaged communities and social groups. See generally Cohen, *Coping with Lasting Social Injustice*, *supra* note 134 (delineating approaches to “coping” with the psychological harms of social structural subordination). There are other insightful approaches. See, e.g., ELIZAR BARKAN, *COMMODIFYING APOLOGIES* (2001); Joseph V. Montville, *The Healing Function in Political Conflict Resolution*, in CONFLICT RESOLUTION THEORY AND PRACTICE: INTEGRATION AND APPLICATION 112 (Dennis J.D. Sandole & Hugo van der Merwe eds., 1993); JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1992); SHRIVER, *supra* note 127. The Social Healing Through Justice framework draws from these and other multidisciplinary works to provide an encompassing approach to reparatory justice initiatives. It does so not to prescribe justice in specific situations but rather to provide participants and observers with points of inquiry for guiding and critiquing serious reparatory initiatives. For an elaboration of the conceptual underpinnings and particulars of the framework, earlier termed interracial justice, see YAMAMOTO, *INTER-RACIAL JUSTICE*, *supra* note 112, at 173.

practices coalesce with liberal legal theory's notions of equality and fairness into common ideas about Social Healing Through Justice.<sup>161</sup> That kind of justice—a reparatory justice—encompasses reconstructing group relationships and repairing lasting damage to group members and to society itself.<sup>162</sup>

### *C. Reparatory Justice and the Four R's of Social Healing*

Four commonalities emerge from diverse disciplines about the dynamics of the kind of justice that fosters social healing. The first is the embrace of the equivalent of the South African social idea of “ubuntu”: all are members of the polity, and injury to one harms the entire community; therefore healing the injured is the responsibility of all.<sup>163</sup> The second is that repair must occur in two realms simultaneously—the individual (micro) and the institutional (macro).<sup>164</sup> Participation in the process must be widespread, and all must see a benefit.<sup>165</sup> The third commonality is that there must be *material change* in the socioeconomic conditions underlying reconstructed group relationships<sup>166</sup>—otherwise, the dangers of “empty apologies,” “all words and no action,” “false grace,” or a “failure of reconciliation.”<sup>167</sup>

161. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 153-72 (discussing in-depth these disciplines' views of healing in light of law's embrace of notions of equality and due process). An important aspect of economic theory, “economic justice,” is also now addressing reparatory justice. See EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE* 1167, 1174 (2005) (addressing “Reparations” and “Redress in the Global Political Economy”); EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *WHEN MARKETS FAIL—RACE AND ECONOMICS* 489 (2006) (addressing “corrective struggles”).

162. The framework thus has special resonance for some indigenous groups whose justice struggles have been mischaracterized solely as claims for “ethnic pride” or “minority rights to equality”—instead of as native peoples' comprehensive claims to restoration of ancestral lands and resources, economic and political self-governance, and cultural protection. See generally Tsosie, *Going Back to Class?*, *supra* note 129. See also generally PACIFIC INDIGENOUS DIALOGUE ON FAITH, PEACE, RECONCILIATION AND GOOD GOVERNANCE (Tui Atua Tamasese Taisi Efi et al. eds., 2007) (articulating Pacific indigenous perspectives on healing and reconciliation); Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189 (2001).

163. See Desmond Tutu, *Without Forgiveness There is No Future*, Foreword to *EXPLORING FORGIVENESS*, at xiii (Robert D. Enright & Joanna North eds., 1998).

164. Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in *HANDBOOK OF REPARATIONS*, *supra* note 10, at 562, 563. See also Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 47-48; YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 199-200. Mutual engagement can be intensely local (classrooms, community halls, churches, temples, neighborhood newsletters) and also deeply cultural, where ideas of injustice and redress are broadly shaped (newspapers, television, internet, movies, scholarly publications). See IFILL, *supra* note 147, at 127 (describing the significance of local as well as broader cultural forms of engagement in reparations and reconciliation debates).

165. Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 47-48.

166. Yamamoto, *Race Apologies*, *supra* note 8, at 54-55 (detailing the further effects of “material change” between people and society).

167. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 194-95. See Cohen, *Coping with*

The fourth commonality among the disciplines distills the other commonalities into the “Four R’s” of Social Healing Through Justice: *recognition, responsibility, reconstruction, and reparation*.<sup>168</sup> These Four R’s offer points of inquiry to assist groups and governments first in shaping a particular redress initiative and then in assessing whether the effort is on the path toward genuine social healing—or whether it is heading toward failure. They also provide justice advocates a strategic language for coalescing self-determined goals into demands that resonate with broad audiences.

This approach encompasses claims of legal right, but it most effectively focuses on collaborative efforts among social groups or between groups and governments that desire productive present-day relations but whose interactions are marred by deep unresolved historic grievances.<sup>169</sup> It does not address situations of continuing strong adversariness, for instance, where criminal prosecutions are central, or where social alignments deprive those injured of political support.<sup>170</sup>

In brief, the first R, *recognition*,<sup>171</sup> addresses the psychological. It looks at ways in which individuals, because of their group identity, continue to suffer “pain, fear, shame and anger.”<sup>172</sup> The *recognition* inquiry also examines the historical and cultural. It scrutinizes the history of the grievance and decodes stock stories embodying cultural stereotypes that seemingly legitimize the injustice (for instance, the unassimilable inherently disloyal Japanese American).<sup>173</sup> Finally, it examines the institutional—the ways that organizational structures can embody discriminatory policies that deny fair access to resources or promote aggression.<sup>174</sup>

*Lasting Social Injustice*, *supra* note 134, at 273 (a compounding “source of anger” among those suffering injustice is the “absence of meaningful redress for the injuries”).

168. INTERRACIAL JUSTICE distilled the multidisciplinary commonalities of Justice into the “Four R’s” framework. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 112, at 174-209. This framework was recently updated and refined. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12.

169. See generally THE HANDBOOK OF REPARATIONS, *supra* note 10.

170. *Id.*

171. For full discussion of *recognition* as part of social healing, see YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 112, at 175-85. See also Jonathan R. Cohen, *The Immorality of Denial*, 79 TUL. L. REV. 903, 915 (2005) (describing the significance of recognition of the harms); Pablo de Greif, *Justice and Reparations*, in HANDBOOK OF REPARATIONS, *supra* note 10, at 460 (“recognition is both a condition and consequence of justice, which links reparations to recognition.”).

172. Cohen, *Coping with Lasting Social Injustice*, *supra* note 134, at 253 (identifying the “pain, fear, shame and anger” as typical harms of social subordination); M. Brinton Lykes and Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Toward Healing, Human Agency, and Rethreading Social Realities*, in HANDBOOK OF REPARATIONS, *supra* note 10, at 589 (discussing healing approaches to group-based psychological harm).

173. YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 112, at 175-84.

174. See *id.* at 184 (explaining the recognition of Balkin leaders regarding the use of law and media to promote and justify “use of violence for territorial conquest, the expulsion of ‘other peoples’”). For example, the East Timor Truth and Reconciliation Commission heard the horrific

The next R, *responsibility*, entails an assessment of “power over” others and an acceptance of responsibility of repairing the damage of “disabling constraints” imposed on others through power abuses.<sup>175</sup> The presidential apology to World War II internees touched all these bases, recognizing “the serious injustice . . . done to Japanese Americans” and accepting responsibility through words and money on behalf of all Americans in order to “rectify the injustice and to uphold the rights of individuals.”<sup>176</sup>

The kind of justice that promotes social healing also necessarily entails the third R—*reconstruction*.<sup>177</sup> Reconstructive acts aim to build a new productive relationship.<sup>178</sup> They include apologies and forgiveness (if appropriate);<sup>179</sup> a re-framing of the history of interactions; and, most important, the reallocation of political and economic power. One aspect of that reallocation means structuring everyone’s “power to” participate fully and freely rather than to enable one’s “power over” others.<sup>180</sup> The power

testimony of women treated as culturally inferior and sexually violated for two decades by Indonesian soldiers and recognized that the trauma, enduring pain, and economic deprivation required more than truth-telling. Wandita, Campbell-Nelson and Pereira, *Reaching Out to Female Victims*, *supra* note 123, at 284, 294-296 (describing the commission’s proactive response to the East Timorian women’s testimony of atrocities). In light of the deep psychological and material harms, the women also required immediate individual and group counseling, job training, artistic expression, social welfare, and financial aid. *Id.*

175. “*Responsibility*,” the second inquiry, asks “groups to assess group agency and accept responsibility for . . . wounds.” YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 185 (“Only by understanding the extent of a group’s agency, constrained by context, can a rough evaluation be made of the extension of its responsibility for harm to others”). For an in-depth discussion, *see id.*

176. *See* YAMAMOTO, CHON, IZUMI, KANG & WU, *RIGHTS AND REPARATION*, *supra* note 7, at 481 (quoting President Bush’s apology letter to former internees).

177. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 190-91. *See generally* GEIKO MULLER-FAHRENHOLZ, *THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION* 28 (1997).

178. *See* YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 190-91. *See also* HERMAN, *supra* note 160, at 133-34 (1997) (one important harm of trauma is disconnection, and recovery depends in part on building new productive relationships).

179. An apology that does not reveal changes in the apologizer’s perspective is “self-serving in self-renewing pursuit of the meaningless” and may be considered “cheap reconciliation.” Ann Calhoun, *A World of Empty Apologies*, *HONOLULU ADVERTISER*, July 24, 1995, at A6. For instance, theologians characterized the Catholic Church’s support of white apartheid and attempts to stop black opposition in South Africa as “cheap reconciliation.” *See* YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 161-162. Cheap grace perpetrates the wounds of injustice. *See generally* DIETRICH BONHOEFFER, *THE COST OF DISCIPLESHIP* (1984).

180. *Reconstruction* of the political relationship to prevent recurrence of the underlying courses of the harm is essential. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 195-96 (describing the difference between “power over” (dominance) and “power to” (parity in participation) in restructured relationships). *See also* Bernadette Atuanene, *From Reparations to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 *SMU L. REV.* 1419 (2007); Cohen, *Coping with Lasting Social Injustice*, *supra* note 134, at 279 (defining redress achievement as “power to” rather than power over). For native peoples, “reconstruction” includes acts that remake social and economic institutions to foster indigenous self-determination. As Jacqueline Johnson Pata of the National Congress of American Indians aptly observes, the U.S. Senate’s recent apology to Native Americans and Native Alaskans is a symbolic first step—but only a first step—towards

restructuring also aims to remake institutions to assure non-repetition of the underlying abuses through “legislative or other reforms affecting the state’s social, legal or political institutions and policies.”<sup>181</sup>

The fourth R, *reparations*, encompasses much more than money. Reparations may include the restoration of property, rebuilding of culture, economic development, and medical, legal, or educational and financial support for individuals and communities in need.<sup>182</sup> *The Handbook of Reparations* suggests that reparations cover restitution, rehabilitation, and monetary payments.<sup>183</sup> Public education can also be an integral component of reparations, as demonstrated by Japanese American redress, in the form of memorials, school curricula, media presentations, or scholarly publications.<sup>184</sup> Public education serves to commemorate, to impart lessons learned, and to generate a new justice narrative about a democracy’s commitment to civil and human rights.

The request for reparations by the East Timorian mother, raped repeatedly by soldiers during the Indonesian occupation, coalesces these many reparatory forms. She sought payment from the Truth and Reconciliation Commission for her children’s education. “I ask for help,” she said, to change our lives and to “put my children through school. I was used like a horse by the Indonesian soldiers who took me in turns and made me bear many children. But now I no longer have the strength to push my children towards a better future. Education is what they need.”<sup>185</sup>

Policymakers, groups, and the general populace collectively need to fully engage all four of these R’s to heal social wounds. Otherwise, even the most sincere healing efforts will likely be experienced as incomplete, insufficient, and ultimately a failure. There is a substantial risk that uncoordinated piecemeal actions, even when well-intentioned, will have

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restructuring institutions in order to discharge the government’s responsibility for the “horrendous actions and a systematic government effort to obliterate Native Americans.” Camire, *Apologies for Past Injustices Seen as First Step*, *supra* note 86, at A5. See also Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809 (2000).

181. See Carrillo, *supra* note 159, at 526-527 (the “first duty of the infringing state is to put an end to the illicit act, if it persists, and then to guarantee that it will not reoccur”).

182. YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 208.

183. Restitution “normally entails the restoration of the victim’s liberty, legal rights and social status” but may also include “recovery of a lost residence, employment or property.” Carrillo, *supra* note 159, at 512 (describing the concept of restitution). Rehabilitation focuses on measures for healing “psychological or physical harm,” including “medical, legal and social services.” *Id.* Money payments compensate for “material losses” or “moral harm.” *Id.* See also Saito, *Remedies for Massive Wrongs*, *supra* note 7, at 281 (stressing the importance of judicial declarations and awards of monetary compensation).

184. The 1988 Civil Liberties Public Education Fund, discussed *supra* Section II, emphasized storytelling and the reparatory dimensions of public education. The Commission administering the Fund authorized school curricula, documentary films, fine arts displays, plays, and scholarly research. See *supra* notes 61-63 and accompanying text.

185. Wandita, Campbell-Nelson and Pereira, *Reaching Out to Female Victims*, *supra* note 123, at 284, 307 (quoting an interview with “AG” of Afaloicai in E. Timor (Sept. 18, 2003)).

only limited salutary impact in light of the full range of harms.

Thus for African Americans struggling with poverty and community disengagement, an apology for slavery and Jim Crow alone is not enough.<sup>186</sup> For the pastor of the Native Hawaiian church that had received an apology from the Asian American churches and a \$28,000 reparations payment from the United Church of Christ for the roles these institutions played in oppressing Hawaiian people after the overthrow of the Hawaiian nation—the apology and payment were important steps forward. But true healing would await further actions by the Church and by government demonstrating fundamental change in dealings with Native Hawaiians.<sup>187</sup>

#### *D. Human Rights Norms Shaping Reconstruction and Reparations*

Indeed, for indigenous Hawaiians and other long-subordinated groups, the harms are “comprehensive,” encompassing resources, culture, and governance; “sustained” over generations; and “systemwide,” implicating national and local governments, businesses, and citizens.<sup>188</sup> A refined Social Healing Through Justice framework suggests that in these situations, a reparatory program of reconstruction and reparation must generate change that is *comprehensive*, *sustained*, and *systemwide* in order to foster the kind of justice that heals. It also suggests that the legitimacy of a democracy professedly committed to civil and human rights is in part dependent upon how it reconstructs relationships and repairs persisting damage.

Global reconciliation initiatives informed by recently adopted human rights norms are refashioning what constitutes systemic injustice<sup>189</sup> and,

186. See generally ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004); BROPHY, REPARATIONS PRO AND CON, *supra* note 8, at 7; Roy L. Brooks, *The Slave Redress Cases*, 27 N.C. CENT. L.J. 130 (2005); Brophy, *Reconsidering Reparations*, *supra* note 153, at 811; Eric J. Miller, *Reconceiving Reparations: Multiple Strategies in the Reparations Debate*, 24 B.C. THIRD WORLD L.J. 45 (2004); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051 (2003).

187. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 212 (describing a pastor's response to the apology and reparations by the Hawai'i Conference of the United Church of Christ and Asian American churches).

188. See *infra* Section IV.D (discussing reparatory justice for colonized indigenous peoples).

189. Civil rights law in the United States has been increasingly influenced by human rights norms. For “nearly half a century,” the U.S. Supreme Court “has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency.” *Roper v. Simmons*, 543 U.S. 551, 604 (2005). In particular, Justices Stevens, Kennedy, Breyer, Ginsburg, and Souter have “appear[ed] quite open to the idea of international human rights law influencing constitutional interpretation of ‘cruel and unusual punishment’ [in *Roper v. Simmons*], and likely in regard to other ‘expansive language’ in the Constitution.” Stanley A. Halpin, *Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT'L & COMP. L. REV. 1, 18-19 (2006). See also, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (Justice Stevens cited Europe's “overwhelming[ly] disapprov[al]” of the death penalty for mentally retarded offenders under the cruel and unusual punishment provision of the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558 (2003) (Justice Kennedy cited a 1981 European Court of Human Rights case recognizing other nations’



therefore, what is needed for comprehensive and sustained *reconstruction* and *reparation*. International human rights instruments guarantee victims of crimes of injustice “an effective remedy.”<sup>190</sup> Whether for slavery, torture, mass rape, or serious racial discrimination, remedies extend well beyond monetary compensation. As mentioned, they encompass social healing—“restitution” (returning), “rehabilitation” (rebuilding, repairing), and prevention of repetition (restructuring).<sup>191</sup> These remedies envision public apologies, memorials, educational programs, new laws, and reformed political institutions.<sup>192</sup>

In 2006, the United Nations General Assembly embraced these broad reparatory remedies in adopting the “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”<sup>193</sup> The Basic Principles and Guidelines emphasize

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protection of homosexuals’ privacy and equal protection rights to declare Texas’ sodomy law unconstitutional); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988)). Justices Kennedy and Breyer have also stated that for due process purposes the tribunals “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 (2006). See also generally Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT’L L. 273 (2006). Justice Ginsburg has further recognized the importance of enforcing human rights law against racial and other forms of discrimination by saying, “We are the losers if we neglect what others can tell us about endeavors to eradicate bias against women, minorities, and other disadvantaged groups. For irrational prejudice and rank discrimination are infectious in our world. In this reality, as well as the determination to counter it, we all share.” Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Right Dialogue*, 21 CARDOZO L. REV. 253, 282 (1999); see also Stephen Breyer, Supreme Court Justice, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 265 (2003) (supporting Ginsburg).

190. The International Covenant on Civil and Political Rights guarantees an “effective remedy” for any person whose human rights have been violated. See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, 21 U.N. GAOR Supp. No. 16, art. 2(3), U.N. Doc. A/6316 (Mar 23, 1966).

191. See, e.g., Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 354 (2008) (rejecting a reparatory scheme for human rights violations that centers around compensation); Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 307 (2003) (arguing that money damages are not the best tailored relief for the harms of slavery because they fail to facilitate the “broader goal” of developing “ways of crafting forward-looking initiatives for racial reconciliation”); Linda M. Keller, *Seeking Justice at the International Criminal Court: Victim’s Reparations*, 29 T. JEFFERSON L. REV. 189, 194 (2007) (identifying a range of available non-monetary remedies for human rights violations). See also generally Basic Principles and Guidelines on the Right to Remedy and Reparation, G.A. Res. 60/147, *supra* note 136.

192. For a description of various possible “effective remedies,” see Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 325 (Louise Henkin ed., 1981); see also generally Basic Principles and Guidelines on the Right to Remedy and Reparation, G.A. Res. 60/147, *supra* note 136.

193. Specifically, victims of human rights violations, including the direct victim’s immediate family and dependants, have a right to “full and effective reparation, . . . restitution, compensation, rehabilitation, ‘satisfaction’” (in the form of public disclosure, public apology, restoration of dignity, and public education) “and guarantees of non-repetition.” Basic Principles and Guidelines on the Right to Remedy and Reparation, G.A. Res. 60/147, *supra* note 136, ¶18.

existing remedial principles of well-established instruments of international law.<sup>194</sup>

Indigenous peoples' human rights norms also broadly shape present-day understandings of reparatory justice. Like general human rights instruments, the recently-adopted United Nations Declaration of Rights of Indigenous Peoples embodies reparatory justice, calling for more than monetary compensation.<sup>195</sup> The Declaration calls for affirmative acts to repair long-term damage to indigenous peoples from the theft of lands, destruction of culture and denial of self-governance.<sup>196</sup> The remedies must be tailored to the harm. That is, when the injuries are long-term and systemic, so must the response.<sup>197</sup>

From this idea emerges specific remedial norms—particularly self-determination.<sup>198</sup> Because the systematic denial of self-determination is a basic harm to indigenous peoples,<sup>199</sup> reparatory justice emphasizes self-determination over economics, culture, and governance.<sup>200</sup> These remedial norms—collectively connoting *reconstruction* and *reparation*—are framed as rights to cultural integrity,<sup>201</sup> lands and resources,<sup>202</sup> social welfare and

194. The Basic Principles and Guidelines on the Right to a Remedy and Reparation reaffirm reparatory principles expressly drawn from: “the Universal Declaration of Human Rights, . . . the International Covenant on Civil and Political Rights, . . . the International Convention on the Elimination of All Forms of Racial Discrimination, . . . the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, . . . the Convention on the Rights of the Child, . . . the African Charter of Human and Peoples’ Rights, . . . the American Convention on Human Rights, . . . the Convention for the Protection of Human Rights and Fundamental Freedoms” and other relevant human rights instruments. Basic Principles and Guidelines on the Right to Remedy and Reparation, G.A. Res. 60/147, *supra* note 136, pmb1.

195. See *infra* notes 206, 209.

196. *Id.* See Declaration on the Rights of Indigenous Peoples, *supra* note 136, arts. 8(2), 11(2) States shall provide effective mechanisms for . . . redress for . . . [a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities . . . . States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

197. *Id.*

198. See, e.g., Miller, *supra* note 101, at 341; Elena Cirkovic, *Self-Determination and Indigenous Peoples in International Law*, 31 AM. INDIAN L. REV. 375, 381 (2006/2007); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 330-31 (1994). See also Andrew Huff, Papers Presented: 2004 ILSA Fall Conference, Oct. 21-23, 2004 University of Colorado School of Law: Panel: Indigenous Rights, Local Resources and International Law: *Indigenous Land Rights and the New Self-Determination*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 295, 321 (2005) (describing indigenous self-determination under the Declaration on the Rights of Indigenous Peoples).

199. The harms of colonization to indigenous peoples are in some respects unique. Anaya, *supra* note 198, at 342. Ethnic minorities have rights to non-discrimination, or equality. See ICCPR, Art. 27. Indigenous people suffered from the exploitation of their natural resources, the appropriation of their traditional lands, and the denial of their right to self-governance. See generally Anaya, *supra* note 198.

200. See *infra* notes 217-220.

201. *Cultural integrity* is “the ability of groups to maintain and freely develop their cultural identities.” Anaya, *supra* note 198, at 342. See also Rebecca Tsosie, *The New Challenge to Native Identity: An Essay on “Indigeneity” and “Whiteness”*, 18 WASH. U. J.L. & POL’Y 55, 77-83 (2005)

development<sup>203</sup> and self-government.<sup>204</sup> The norms shape social healing for indigenous peoples.<sup>205</sup> Significantly, these norms apply more broadly to shape reparatory justice for the group-based harms of systemic subordination for other groups as well.<sup>206</sup>

### *E. Linking Redress to Democratic Legitimacy*

The problem with asserting human rights claims directly in courts is that, generally, most courts refuse to enforce those claims.<sup>207</sup> Human rights norms remain largely aspirational. Yet, despite the difficulty of achieving favorable court judgments, strategically framing legal claims partly in

(discussing indigeneity and cultural rights). The U.N. Declaration on the Rights of Indigenous Peoples recognizes indigenous peoples' right to practice and revitalize their cultural traditions and customs. See, e.g., Declaration on the Rights of Indigenous Peoples, *supra* note 136, arts. 12, 14, 15.

202. Indigenous human rights norms aim to restore indigenous peoples' special connection to land and resources. See Anaya, *supra* note 198, at 352; Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 87 (2008); Huff, *supra* note 198, at 330; Tsosie, *The New Challenge to Native Identity*, *supra* note 201, at 68-77. The Declaration on the Rights of Indigenous Peoples recognizes a broad indigenous peoples' right to their "distinctive spiritual relationship" with traditional lands, water and resources. Declaration on the Rights of Indigenous Peoples, *supra* note 136, art. 25.

203. The Declaration on the Rights of Indigenous Peoples recognizes that indigenous peoples have "the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security" and that "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions." *Id.*, art. 21. In addition, the U.N. Declaration on the Right to Development recognizes "an inalienable human right by virtue of which every person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." United Nations Declaration on the Right to Development, A/RES/41/128 (Dec. 4, 1986), available at <http://www.un.org/documents/ga/res/41/a41r128.htm>.

204. Human rights embrace *self-governance*—the idea that "government is to function according to the will of the people governed." Anaya, *supra* note 198, at 354. See also Tsosie, *The New Challenge to Native Identity*, *supra* note 201, at 63-68 (discussing indigeneity and political rights).

205. One obvious way that the Declaration informs indigenous healing is its explicit recognition of indigenous peoples' unique, collective, and spiritual relationship with traditional lands and waters. For example, the Chthonic (indigenous) legal tradition inherently recognizes land as a part of indigenous identity. See generally H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* (2000).

206. See Basic Principles and Guidelines on the Right to Remedy and Reparation, G.A. Res. 60/147, *supra* note 136. The Basic Principles and Guidelines recognize group-based claims to reparation. "Contemporary forms of victimization . . . may . . . be directed against groups of persons who are targeted collectively." *Id.* at pmbl. Victims include persons who "collectively suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights." *Id.* at ¶ 8. Additionally, the principles require that group victims be allowed access to justice by presenting claims for reparation and receiving reparation. *Id.* at ¶ 13.

207. RICHARD B. LILICH AND HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS PROBLEMS OF LAW, POLICY, AND PRACTICE* 502 (2006). See generally Jon M. Van Dyke, *Reparations for the Descendants of American Slaves Under International Law*, in *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 57, 58 (Raymond A. Winbush ed., 2003); Halpin, *supra* note 189, at 4-12, 38 (describing the four human rights enforcement models and how they generally have failed to secure human rights court judgments in the United States).

human rights terms can be an effective Social Healing Through Justice political strategy.<sup>208</sup>

Although reparations claims rarely succeed in court, most politically successful reparations or reconciliation movements have been inspired and shaped at crucial points by litigation.<sup>209</sup> That litigation serves as a lightning rod for *recognition* and *responsibility* and as a bully pulpit for community organizing about the injustice and need for system-wide *reconstruction* and *reparation*.<sup>210</sup> Sociolegal research suggests that international human rights claims widely-publicized through court challenges, in certain political settings, alter over time what both government policymakers and the public come to view as “‘right,’ ‘natural,’ ‘just,’ or ‘in their interest.’”<sup>211</sup> This in turn can help build public pressure to enable progressive leaders to press a government politically to heal the wounds of injustice.

More specifically, political pressure for recognition of and acceptance of responsibility for historic harms is increasingly linked to the legitimacy of present-day democratic governance.<sup>212</sup> Although social healing initiatives differ, policymakers and justice advocates from established and emerging democracies<sup>213</sup> coalesce around a precept grounded in human rights principles: redress for injuries of past injustice is foundational to democratic legitimacy.<sup>214</sup>

The Social Healing Through Justice framework’s integration of human rights norms highlights this linkage of redress to legitimacy. Democratic legitimacy—or the perception of a government’s validity in terms of democratic governance and its commitment to civil and human rights<sup>215</sup>—is particularly important for the United States in light of the dramatic decline of American stature in international affairs.<sup>216</sup> As one

208. See Yamamoto, Serrano & Rodriguez, *American Racial Justice on Trial*, *supra* note 7, at 1319.

209. See *id.* at 1322.

210. See *id.*

211. See Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1269 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

212. See HANDBOOK OF REPARATIONS, *supra* note 10 (describing successful international reparations movements as a part of democratic nation-building). See also Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 64 (assessing “reparations as integral to democratic legitimacy”).

213. See LEGACIES OF INJUSTICE, *supra* note 102, at 11.

214. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 69.

215. See Berman, *supra* note 211, at 1292 (describing how adhering to international human rights norms can advance a government’s long-term interests by “allowing the state to have legitimacy and a certain morally persuasive voice in the eyes of other states.”).

216. Departing United Nations Secretary General Kofi Annan challenged the United States under President Bush to stop behaving like a rogue nation and act cooperatively and abide by human rights. See Reynolds Holding, *A Law of Convenience*, TIME, Mar. 5, 2007, at 48 (reporting on Annan’s departing remarks). See generally ERIC ALTERMAN & ERIC GREEN, *THE BOOK ON BUSH: HOW GEORGE W. (MIS)LEADS AMERICA* (2004); DAVID CORN, *THE LIES OF GEORGE W. BUSH: MASTERING*

commentator aptly observes, while the “ideal of the United States as beacon of justice, democracy, freedom and human rights still garners grudging respect abroad,” America’s “moral standing [as a democracy] in the world has precipitously declined since 2001.”<sup>217</sup>

This international loss of moral authority as a democracy is implicated in a Social Healing Through Justice approach to redress. It reveals the self-interest of the United States in redressing American injustices. For instance, historically, harsh international criticism of America’s racist Jim Crow democracy during the Cold War compelled United States political leaders to shift positions and argue for ending the separate-but-equal doctrine in *Brown v. Board of Education*.<sup>218</sup> President Reagan reversed his prior opposition to Japanese American redress in 1988 when America needed to bolster its stature as a democracy during its end-stage fight against the “iron curtain.”<sup>219</sup> For modern redress advocates, this kind of American self-interest in redress lies at the heart of Derrick Bell’s theory of interest-convergence—that a dominant power will countenance civil and human rights advances only when those gains simultaneously serve its larger political interests.<sup>220</sup>

The near-unilateral prosecution of the Iraq war by the United States, its charged human rights abuses at Abu Ghraib, Guantanamo Bay, and secret detention centers, and its post-9/11 domestic civil liberties violations, has tarnished its reputation worldwide.<sup>221</sup> And because it also has refused to engage recent national redress efforts, including reparations for African Americans,<sup>222</sup> land reclamation for Native Americans,<sup>223</sup> and self-

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THE POLITICS OF DECEPTION (2003); PAUL WALDMAN, FRAUD: THE STRATEGY BEHIND THE BUSH LIES AND WHY THE MEDIA DIDN’T TELL YOU (2004).

217. Julia E. Sweig, *Anti-Americanism – It’s Not All Bush’s Fault*, L.A. TIMES, Aug. 15, 2006, available at <http://articles.latimes.com/2006/aug/15/opinion/oe-sweig15>.

218. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

219. See Yamamoto, *Social Meanings of Redress*, *supra* note 1, at 231 (describing the importance to American policymakers of perceptions of American commitment to civil and human rights at the moment the United States sought to promote democracy and end the cold war with the Soviet Union).

220. See Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (describing a convergence of interests of the dominant group and the subordinate group as a pre-condition to civil rights and progress under law).

221. See Natsu Taylor Saito, *For “Our” Security: Who is an “American” and what is Protected by Enhanced law Enforcement and intelligence Powers?* 2 SEATTLE J. SOC. JUST. 23, 40 (2004); Eric K. Yamamoto, *White(House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 285 (2008).

222. Yamamoto, Serrano, & Rodriguez, *African American Reparations*, *supra* note 7, at 1291 (describing the international uproar at the Bush Administration’s refusal to participate in the Durban South Africa International Conference on Racism because of the Conference’s consideration of reparations for African Americans).

223. See WARD CHURCHILL, THE STRUGGLE FOR LAND: NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION (1999); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615 (2000).

determination for Native Hawaiians,<sup>224</sup> the United States has faced strong criticism about its legitimacy as a democracy that is genuinely committed to civil and human rights.<sup>225</sup>

To reclaim legitimacy, an established democracy like the United States needs to demonstrate fealty to internationally respected precepts of democratic governance. In particular, the United States must heal the continuing wounds of injustice inflicted on its own people.<sup>226</sup> Indeed, as revealed through the Japan-Ainu reparatory efforts discussed later, a democracy struggling for moral high ground under the glare of international criticism sometimes responds by advancing a national social healing initiative.

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With roots in Japanese American redress and multidisciplinary insights into social group healing, deepened by human rights notions of reparatory justice, the Social Healing Through Justice framework is next employed to critique, and possibly guide, two ongoing redress initiatives. The first is the United States' commitment to reconcile with Native Hawaiians. The second is Japan's efforts to repair the persisting harms to indigenous Ainu. We employ the Four R's to illuminate the salutary aspects and shortfalls of these halting yet recently rejuvenated initiatives and to highlight the strategic linkage of social healing initiatives to democratic legitimacy.

## V. THE UNITED STATES' COMMITMENT TO RECONCILE WITH NATIVE HAWAIIANS

When English Captain James Cook initiated Western contact with Hawai'i in 1778 and introduced foreign diseases, Native Hawaiians numbered around 800,000.<sup>227</sup> By the late 1880s, the indigenous population plummeted to 40,000.<sup>228</sup> Westerners also politically undermined the

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224. See *infra* Section IV (addressing Native Hawaiian reconciliation).

225. Yamamoto, Serrano, & Rodriguez, *African American Reparations*, *supra* note 7, at 1291

226. *Id.* at 1294.

227. See LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 20 (1992).

228. See *id.* Devastation "came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence, and trust of the Kānaka Maoli as surely as leprosy and smallpox claimed their limbs and lives." JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 3 (2002).

Christian missionaries arrived in 1820 and encouraged Chieftess Ka'ahumanu to reject Hawaiian gods and centuries-old "kapu" (moral-legal) system. See KAME'ELEIHIWA, *supra* note 227, at 166, 388. The missionaries endeavored to civilize the "heathen savages," the "wretched creatures." MARY KAWENA PUKUI, E.W. HAERTIG, M.D., & CATHERINE A. LEE, NĀNĀ I KE KUMU (LOOK TO THE SOURCE), VOLUME II 302 (1972). In 1848, the old, sophisticated order of a communal subsistence land tenure system was replaced by Western concepts of property ownership. See JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 1 (2008); WALDO E. MARTIN & PATRICIA SULLIVAN, CIVIL

sovereign Hawaiian kingdom. The Hawaiian League, composed of *haole* (Caucasian) men,<sup>229</sup> through threat of force, compelled King David Kalākaua to sign the Bayonet Constitution transferring much of his royal authority to white American businessmen.<sup>230</sup>

In 1893, the internationally recognized sovereign Hawaiian nation was overthrown by the small group of American businessmen with the direct backing of the U.S. military.<sup>231</sup> The quest for fertile plantation lands, tariff-free U.S. markets, political power, and military control fueled the coup.<sup>232</sup> Queen Lili'uokalani, who resisted, was imprisoned in her own palace.<sup>233</sup> American President Grover Cleveland objected to what he called the "illegal" United States-aided overthrow, which he also characterized as an "act of war."<sup>234</sup> Out of his "desire to aid in the restoration of the status existing before the lawless landing of the United States forces at Honolulu,"<sup>235</sup> he initiated support for Hawaiian sovereignty and the re-establishment of the Hawaiian nation by withdrawing a pending treaty for annexation.<sup>236</sup>

But with the Pearl Harbor military base and vast acreage of sugar cane lands at stake, the next president, William McKinley, with strong American business support, pushed Congress to annex Hawai'i by joint resolution<sup>237</sup> (a defective means of annexation).<sup>238</sup> Despite formal protest by the former

RIGHTS IN THE UNITED STATES 333 (2000). The Māhele required the *maka'āinana*, or commoners, to make claims for land with the Land Commission. See JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 1, 46 (2008). Because of legal restrictions, cost and foreignness of the idea of private property, the Māhele failed to make commoners landowners. Instead, American missionaries and businessman became large land holders. KAME'ELEIHIWA, *supra* note 227, at 296.

229. See OSORIO, *supra* note 228, at 193.

230. See VAN DYKE, *supra* note 228, at 123. This "allowed the whites political control without requiring that they swear allegiance to the king." See OSORIO, *supra* note 228, at 197.

231. See III RALPH KUYKENDALL, THE HAWAIIAN KINGDOM, 587-88 (1967). By 1893, the population declined to 40,000. *Id.*

232. The discussion of Hawaiian history and reconciliation here is drawn substantially from an essay by Ashley Kaiao Obrey, published in the Ka He'e Summer 2007 newsletter of the Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai'i. See *generally Broken Promise? A Brief Update on the U.S. Role in Native Hawaiian Reconciliation since the 1993 Apology*, KA HE'E (Center for Excellence in Native Hawaiian Law, William S. Richardson School of Law, University of Hawai'i), Aug. 2007, available at <http://www2.hawaii.edu/~nhlawctr/article3-6.htm>.

233. See LILI'UOKALANI, HAWAI'I'S STORY BY HAWAI'I'S QUEEN 268-69 (1964).

234. President Grover Cleveland, Message to the Senate and House of Representatives at the Executive Mansion in Washington (Dec. 18, 1893), available at <http://hawaii-nation.org/cleveland.html>.

235. *Id.*

236. See *id.*

237. See Melody K. MacKenzie, "Historical Background," in Native Hawaiian Rights Handbook 14 (Melody Kapilialoha MacKenzie ed., 1991); "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States," 30 Stat. 750 (1898). See also TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAI'I (1992).

238. "Proper" annexation involves a treaty and a vote of Congress. See U.S. CONST. art. II, § 2, cl. 2.

Queen and over twenty-one thousand Native Hawaiians—most of the adult Hawaiian population—the United States imposed American political governance over the islands and confiscated all Hawaiian government and royal lands.<sup>239</sup> To justify their actions, American politicians and media badly mischaracterized Hawaiians as uncivilized heathens in need of civilizing influences.<sup>240</sup> What followed was the continued separation of Native Hawaiians from the land, the suppression of Hawaiian culture, and the dislocation of families. The United States later acknowledged this “devasta[tion]” of indigenous Hawaiian life.<sup>241</sup>

One hundred years later, amidst a Hawaiian cultural renaissance and intense political organizing for a return of sovereignty and homelands,<sup>242</sup> and with support of religious leaders and a Democratic president, the United States finally acknowledged the harms of American colonization.<sup>243</sup> The extraordinary 1993 Congressional Apology Resolution apologized for the role America played in the 1893 “illegal overthrow” of the Hawaiian nation<sup>244</sup> and committed the United States to reconciliation to repair the resulting “devastation.”<sup>245</sup>

The Apology Resolution’s commitment to redress reflected careful attention to the Social Healing Through Justice framework’s first and second R’s: (1) *recognition* of the physical, cultural and economic damage

239. See Report of L.A. Thurston on the Hawaiian Anti-Annexation petition, in Kū’ē: The Hui Aloha ‘Āina Anti-Annexation Petitions, 1897-1898, at 820, available at <http://libweb.hawaii.edu/digicoll/annexation/petition/pet820.html>.

240. See Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1775-76 (2000).

241. See Apology Resolution, Pub. L. No. 103-150, Nov. 23, 1993. Under the territorial government created by the Organic Act of 1900, Hawai‘i Organic Act (1900), “the remnants of Hawaiian land tenure, other traditional or customary institutions, and cultural practices, including the use of the Hawaiian language, were suppressed.” See HAUNANI KAY-TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I 2-4 (1993); Anaya, *supra* note 198, at 315, 335. Thus, Hawai‘i’s history “is a story of violence, in which that colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. The mutilations were not physical only, but also psychological and spiritual.” See OSORIO, *supra* note 228, at 3.

242. See *id.*

243. See Apology Resolution, Pub. L. No. 103-150, Nov. 23, 1993. In November 1993, one hundred years after the overthrow of the Hawaiian Kingdom, President William Clinton signed the Apology Resolution into law. See *id.*

244. *Id.* Specifically, Congress, “on the occasion of the 100th anniversary of the *illegal* overthrow of the Kingdom of Hawaii”

Acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people [and] apologizes to Native Hawaiians . . . for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.

*Id.* (emphasis added).

245. *Id.* (“[Congress] expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”).



of America's colonization of Native Hawaiians;<sup>246</sup> and (2) acceptance of *responsibility* by committing to a process of reconciliation.<sup>247</sup>

The Apology Resolution recognized that the Hawai'i state legislature had already expressed a firm commitment to reconcile with Native Hawaiians for misappropriating and mismanaging Hawaiian lands held in trust.<sup>248</sup> And the Resolution's inclusion of the United Church of Christ signaled the national Church's acceptance of responsibility for its missionary role in the overthrow (with a \$1.5 million payment and an apology).<sup>249</sup>

In 1999, President Clinton's administration further committed the United States to reconciliation,<sup>250</sup> sending the Department of Interior and Department of Justice to Hawai'i to hear testimony from hundreds of Native Hawaiians from all islands about what federal and state actions were needed next.<sup>251</sup> The Departments' Joint Reconciliation Report recommended that the government engage with Native Hawaiians and undertake affirmative acts to heal the persisting wounds of American injustice. Invoking language of moral *responsibility*, and drawing on the human rights principle of self-determination, the Report recommended *reconstructing* the relationship between indigenous Hawaiians and the

246. See *id.* ("Whereas, the long-range economic and social changes in Hawaii over the Nineteenth and early Twentieth Centuries have been devastating to the population and to the health and well-being of the Hawaiian people").

247. Through the Resolution, Congress "express[ed] its *commitment* . . . to provide a proper foundation for *reconciliation* between the United States and the Native Hawaiian people" and "recognize[ed] and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians." See *id.*

248. See *A Broken Trust: The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, Hawai'i Advisory Committee to the United States Commission on Civil Rights 21 (Dec. 1991). See also Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008).

249. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 211, 215. The Asian American United Church of Christ churches in Hawai'i, comprised of former immigrants and descendants who had struggled against haole discrimination, also confessed "complicity" in the subordination of Hawai'i's indigenous people for a century following the overthrow. See *id.* Those Asian American churches helped move the UCC Hawai'i Conference's 120 multiracial churches to embark in the mid-1990s on a comprehensive, four-year reconciliation initiative encompassing apologies, healing ceremonies, payments of monetary reparations, land transfers and the establishment of a Native Hawaiian community foundation. See *id.*

250. See Department of the Interior and the Department of Justice, Report on the Reconciliation Process Between the Federal Government and Native Hawaiians: From Mauka to Makai: The River of Justice Must Flow Freely (Draft Report), (Aug. 23, 2000), available at [http://www.iiirm.org/hawaiian\\_consultation/workshop%20materials/river\\_justice.pdf](http://www.iiirm.org/hawaiian_consultation/workshop%20materials/river_justice.pdf) [hereinafter Joint Reconciliation Report].

251. See *id.* According to John Berry (Department of the Interior) and Mark Van Norman (Office of Tribal Justice, for the Department of Justice), the Apology was the "first step in the healing process." See *id.* In 1999, representatives of each Department consulted the Native Hawaiian communities on seven islands. On the main island of Oahu, several hundreds testified and 265 submitted written statements on topics ranging from sovereignty to community and economic development to health, education and housing. See *id.*

United States by legislatively recognizing Native Hawaiian semi-independence (similar to the status of Native Americans).<sup>252</sup> It also highlighted the need for *reparatory* government programs to repair the cultural and economic harms to Native Hawaiians.<sup>253</sup>

The Report concluded that the “time has come for the United States Government and Native Hawaiians to join hands to repair the past and build a better future, based upon righteousness and justice, and guided by the spirit of healing and aloha to fulfill the goal of reconciliation.”<sup>254</sup>

In both tone and content, the Report presaged the broad vision of reparatory justice of the Declaration of Rights of Indigenous Peoples<sup>255</sup>—repairing persisting damage through a combination of government, citizenry and native community support for indigenous culture and forms of knowledge,<sup>256</sup> for the return of homelands, and for native control<sup>257</sup> over social welfare, economic development, and political institutions.<sup>258</sup>

Congress enacted *reparatory* legislation, beginning in the late 1980s, that accelerated after the Resolution through the early 2000s. It returned the island of Kaho’olawe to Native Hawaiians, which the government had taken and long used for military bombing practice.<sup>259</sup> It also reauthorized

252. *See id.*

253. *See id.* The Report supported existing reparatory legislation addressing Native Hawaiians’ economic deprivation, low educational attainment, poor health status, substandard housing, and social dislocation, including the Native Hawaiian Health Care Act, the pending Hawaiian Health Care Improvement Act, Native Hawaiian Healthcare Act of 1988, 42 U.S.C. § 11701, the Native Hawaiian Education Act, Native Hawaiian Education Act, 20 U.S.C. § 7902 (1988), and various Native Hawaiian Housing programs. *See* Joint Reconciliation Report, *supra* note 250, at 2.

254. *Id.*

255. *See* Declaration on the Rights of Indigenous Peoples, *supra* note 136 (“Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.”).

256. *See id.*; Ko Hasegawa, *Polymorphic Integration of the Ainu* 2 (2008) (on file with author). Although indigenous struggles are usually localized, “they have been globalised in the channels of international political organizations that have amplified their voices.” *See* Richard Rice, *Ainu Submergence and Emergence: Human Rights Discourse and the Expression of Ethnicity in Modern Japan*, Southeast Review of Asian Studies 3 (2006, ed. 2008), available at <http://www.uky.edu/Centers/Asia/SECAAS/Seras/2006/Rice.doc> (citing Jonathan Friedman, *Indigenous Struggles and the Discreet Charm of the Bourgeoisie*, PERPLEXITIES OF IDENTIFICATION: ANTHROPOLOGICAL STUDIES IN CULTURAL DIFFERENTIATION AND THE USE OF RESOURCES 161 (2000)); Marlene Brant Castellano, *Updating Aboriginal Traditions of Knowledge*, INDIGENOUS KNOWLEDGES IN GLOBAL CONTEXTS: MULTIPLE READINGS OF OUR WORLD 33 (Georg Jerry Sefa Dei, Budd L. Hall, & Dorothy Goldin Rosenberg eds., 2000).

257. Declaration on the Rights of Indigenous Peoples, *supra* note 136. The Declaration on the Rights of Indigenous Peoples recognizes that indigenous people have the right to self-determination that gives them the right to “freely determine their political status and freely pursue their economic, social, and cultural development.” *Id.*

258. According to Professor Haunani Kay-Trask, the colonizer possesses the power to dictate the terms of any agreements—including reconciliatory arrangements. It can choose whether it acknowledges the aggrieved parties’ complaints and will only act in its own self-interest during negotiations. *See* KAY-TRASK, *supra* note 241, at 104.

259. HAW. REV. STAT. § 6K (2007). *See also* VAN DYKE, *supra* note 228, at 269.

the Native Hawaiian Health Care Act,<sup>260</sup> passed the Native Hawaiian Education Act<sup>261</sup> and established and funded various Native Hawaiian Housing programs.<sup>262</sup> The State of Hawai'i also stepped up its promotion of Hawaiian language in public schools and accelerated development of Hawaiian Homelands.<sup>263</sup>

But then reconciliation efforts stalled. The United States expanded military operations on vast tracks of former Hawaiian government and royal lands.<sup>264</sup> Following the lead of national think tanks,<sup>265</sup> the Bush administration opposed federal and state Native Hawaiian programs as unlawful "racial preferences."<sup>266</sup> A conservative U.S. Supreme Court partially echoed that sentiment in *Rice v. Cayetano* in invalidating a Native Hawaiian-only voting requirement for trustees of the Office of Hawaiian Affairs (OHA).<sup>267</sup> OHA had been created by state constitutional amendment to promote Native Hawaiian self-determination and serve as a

260. Native Hawaiian Healthcare Act of 1988, 42 U.S.C. § 11701. In 2007, Congress budgeted nearly \$14 million for Native Hawaiian health care under pending legislation known as the Native Hawaiian Health Care Improvement Act, which was introduced in early 2005. Native Hawaiian Health Care Improvement Reauthorization Act of 2005, S.215 [109<sup>th</sup>], introduced January 31, 2005.

261. Native Hawaiian Education Act, 20 U.S.C. § 7902 (1988).

262. Dennis Camire, *House OKs Hawaiian housing*, HonoluluAdvertiser.com (March 29, 2007), available at [http://www.house.gov/abercrombie/pdf/hawaii\\_housing\\_032907.pdf](http://www.house.gov/abercrombie/pdf/hawaii_housing_032907.pdf)

263. See generally Kauaʻoe Kamana and William H. Wilson, *Hawaiian Language Programs, in* STABILIZING INDIGENOUS LANGUAGES (Gina Cantoni ed., 1996); Gordon Y.K. Pang, *More are realizing homestead dreams*, HONOLULU ADVERTISER, Feb. 11, 2007, available at <http://the.honoluluadvertiser.com/article/2007/Feb/11/In/FP702110352.html>.

264. See Melody MacKenzie, *The Ceded Lands Trust*, HAWAII STATE ASSOCIATION HAWAII BAR JOURNAL, June 2000, at n.11. See also *Kū I Ka Pono: Stop Military Expansion*, DMZ HAWAII/Aloha ʻĀina, Sept. 6, 2004, <http://www.dmzhawaii.org/dmz-legacy-site/kuikapono.pdf>.

265. Correcting the Record: The U.S. Commission on Civil Rights and Justice for Native Hawaiians, Office of Hawaiian Affairs, Oct. 2007 (on file with author).

266. For example, several conservative members of Congress objected to the Akaka Bill—which would provide a process of reorganization of the Native Hawaiian governing entity—as a simple racial preference. See Richard Borreca, *GOP Senator Skewers Akaka Bill*, HONOLULU STAR-BULLETIN, June 24, 2005, <http://starbulletin.com/2005/06/24/news/story4.html>; see Native Hawaiian Government Reorganization Act of 2009, S. 708/H.R. 1711, 111<sup>th</sup> Cong. (2009) [introduced in the Senate by Senator Daniel Akaka on February 4, 2009].

267. See *Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that because the Office of Hawaiian Affairs is an agency of the state, the election of its trustees must be open to all Hawai'i citizens). In its decision, the U.S. Supreme Court not only misunderstood Hawaiian history, including colonization and the illegal overthrow, it also downplayed its role in the ordeal, leading to the breakdown of the current transformative relationship—psychological and political—with Native Hawaiians. See generally Gavin Clarkson, *Recent Developments: Not Because They're Brown, But Because of EA, Rice v. Cayetano*, 528 U.S. 495 (2000), 24 HARV. J.L. & PUB. POL'Y 921 (2001). By distorting Hawaiian history—presenting a limited account without accepting the U.S.' responsibility for the events described—the Court denied Hawaiians a measure of self-governance. Hom & Yamamoto, *Collective Memory*, *supra* note 240, at 1774 (describing the *Rice* court's distortion of history to imply that the overthrow was in fact "justified by Queen Lili'uokalani's undemocratic actions"). See also *Arakaki v. Lingle*, 477 F.3d 1048 (2007) (Plaintiffs brought suit claiming that state programs administered through the Department of Hawaiian Home Lands, the Hawaiian Homes Commission and the Office of Hawaiian Affairs give special treatment to Native Hawaiians in violation of the Due Process and Equal Protection clauses).

“receptacle for reparations.”<sup>268</sup>

Conservatives in Hawai‘i filed additional lawsuits to invalidate all state reparatory Native Hawaiian programs, including the allocation of Hawaiian homelands and the protection of Hawaiian culture.<sup>269</sup> These suits first denied America’s history of colonization of Hawai‘i and then characterized indigenous Hawaiians as merely another racial group seeking special privileges.<sup>270</sup> For instance, accepting the argument of an attorney associated with a conservative national advocacy group,<sup>271</sup> a Ninth Circuit panel rejected a private Hawaiian school’s Hawaiian admissions policy as “reverse discrimination.”<sup>272</sup>

268. HAW. REV. STAT. §10-3(6); *see also* Day v. Apoliona, 451 F. Supp. 2d 1133 (D. Haw. 2006); Eric K. Yamamoto and Chris Iijima, *The Colonizer’s Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (Summer 2000), available at <http://www.colorlines.com/article.php?ID=75>. Specifically, OHA is a special state agency created by a 1978 Hawai‘i Constitutional amendment to address the historical harms to Native Hawaiians. *See generally* D. Kapua‘ala Sproat and Isaac H. Moriwake, *Ke Kalo Pa‘a o Wai‘ahole: Use of the Public Trust as a Tool for Environmental Advocacy* 247, in *Creative Common Law Strategies for Protecting the Environment* (eds. C. Rechtschaffen & Denise Antolini 2008) (describing contests over water as a cultural asset).

269. *See*, Arakaki v. Lingle, 314 F.3d 1091 (9th Cir. 2002).

270. *See* Eric K. Yamamoto and Catherine Corpuz Betts, *Rice v. Cayetano: Disfiguring Civil Rights to Deny Indigenous Human Rights for Native Hawaiians*, in RACE AND LAW STORIES (Rachel Moran and Devon Carbado eds. 2008) (describing attacks on Native Hawaiian programs as special privileges).

The reparatory programs now legally challenged as seeking special privileges and ultimately “reverse discrimination” involve education for Hawaiian children (Kamehameha Schools), *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006); Jim Dooley and Gordon Y.K. Pang, *Kamehameha Schools again being sued over admissions policy*, HONOLULUADVERTISER.COM, Aug. 7, 2008, <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080807/NEWS01/808070356/1001> [hereinafter Dooley and Pang, *Kamehameha Schools Again Being Sued*]. *See also* Susan K. Serrano, Eric K. Yamamoto, Melody Kapilioloha MacKenzie, & David M. Forman, *Restorative Justice for Hawai‘i’s First People: Selected Amicus Curiae Briefs in Doe v. Kamehameha Schools*, 14 ASIAN AM. L.J. 205 (2005); the development and redistribution of Hawaiian homelands, *Arakaki*, 314 F.3d at 1091; Hawaiian Homes Commission Act, 1920, 67 Pub. L. 34, 42 Stat. 108 (1921), *reprinted in* 1 Haw. Rev. Stat. § 191 (1993); and the protection and promotion of Hawaiian culture, *Arakaki*, 314 F.3d at 1091.

271. *See* Eric Grant, Oyez.org, available at [http://www.oyez.org/advocates/g/eric\\_grant/](http://www.oyez.org/advocates/g/eric_grant/). (Eric Grant is an attorney for the Pacific Legal Foundation.) *See also* Pacific Legal Foundation available at <http://community.pacificlegal.org/Page.aspx?pid=183>.

272. *See* Dooley and Pang, *Kamehameha Schools Again Being Sued*, *supra* note 270.

Kamehameha Schools was established in 1887 by will of Princess Bernice Pauahi Bishop. Her will, which directed her trustees “to devote a portion of each years income (from the land trust) to the support and education of orphans, and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood.” *Ke Ali‘i Pauahi Bishop (1831-1834): Will and Codicils*, Kamehameha Schools (last visited Apr. 29, 2008), available at <http://www.ksbe.edu/pauahi/will.php>. In both 2002 and 2003, federal lawsuits attacking Kamehameha Schools’ admissions policy—specifically whether its provision giving preference to Native Hawaiians is a race-based exclusion violating civil rights law—have been settled. In 2003, an anonymous plaintiff claimed that giving preference to Hawaiian applicants violates a federal statute prohibiting racial discrimination in private contracts, and the Ninth Circuit Court of Appeals struck down the policy. *See Doe v. Kamehameha*, 416 F.3d 1025 (9th Cir. 2005). The Ninth Circuit later reversed and upheld the admissions policy in an en banc decision in 2006. *See Doe v. Kamehameha*, 416 F.3d 1025 (9th Cir. 2006); Dooley and Pang, *Kamehameha Schools Again Being Sued*, *supra* note 270.

The plaintiffs’ attorneys have since filed another lawsuit on behalf of four new anonymous

The Bush Administration also opposed legislation creating a process for limited self-determination for Hawaiians under supervision of the U.S. Department of Interior.<sup>273</sup> Despite passage of the Akaka Bill by the House, Senate Republicans charging racial discrimination blocked a floor vote on the bill.<sup>274</sup>

Thus, sixteen years after the Apology Resolution and nine years after the Joint Reconciliation Report, the United States' reparatory commitment teeters on the brink of overall failure despite initial progress on *recognition* and *responsibility*. The third and fourth R's of the Social Healing Through Justice framework illuminate not only why, but also open a path for framing future action.

Without *reconstruction* and *reparation*, there will be no compelling sense of the kind of reparatory justice that fosters social healing—for Native Hawaiians and for American society. There will be no reconstruction of a meaningful form of Hawaiian governmental sovereignty demanded by Native Hawaiian people, no satisfactory return of Hawaiian lands,<sup>275</sup> no clear protection of indigenous culture, no structure for economic self-determination—all human rights reparatory mandates in principle. Incomplete healing. A failing commitment to reconciliation. Continuing divisions in Hawai'i's society.

The Hawai'i Supreme Court effectively acknowledged this very proposition in the 2008 case *OHA v. HCDCH*.<sup>276</sup> In its extraordinary ruling, the high court cited the state's stalled commitment to reconciliation with Native Hawaiians as the reason for imposing a freeze on the state's sale of former native lands now held in trust.<sup>277</sup> For the first time, a court imposed major legal consequences onto a government's reconciliation

plaintiffs of non-Hawaiian descent who claim they qualified for admission, aside from their ancestry. See Craig Gima, *Kamehameha Schools: Preference Policy Facing New Challenge: 4 Challenge Racial Preference*, HONOLULU STAR-BULLETIN, Aug. 7, 2008, available at <http://archives.starbulletin.com/2008/08/07/news/story01.html>.

273. See *supra* note 267 and accompanying text. (The former Clinton Administration supported the Bill.)

274. See Native Hawaiian Government Reorganization Act of 2009, S. 708/H.R. 1711, 111th Cong. (2009).

275. See VAN DYKE, *supra* note 228.

276. See *OHA*, 177 P.3d at 902. The Hawai'i Supreme Court ordered the governor to stop selling formerly native lands (now held in trust by the state in part for the benefit of Native Hawaiians) until indigenous Hawaiian reparations claims related to the lands are resolved through negotiation as part of the state's legislative commitment to reconciliation.

277. See *id.* On April 29, 2008, the State Attorney General filed a Petition for a Writ of Certiorari to the U.S. Supreme Court asking for reversal. See *State Asks U.S. Supreme Court to Overturn Decision Restricting Sale of Ceded Lands*, HAWAII REPORTER, Apr. 29, 2008, available at <http://www.hawaiiireporter.com/story.aspx?32e7a81c-4885-437a-98ea-6ecbf1000386>. The petition questioned the Hawai'i Court's interpretation of the Apology Resolution as law, contending that "nothing in the Apology Resolution explicitly or implicitly impairs Hawai'i's sovereign right to control or alienate any of the lands it owns." *Id.* The U.S. Supreme Court granted the petition on October 1, 2008 and reversed the state court's ruling on March 1, 2009. See *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009).

commitment. The state cannot intone “reconciliation” to garner good graces and then abandon reparatory action when politically convenient. The state’s unfulfilled reconciliation commitment curtails the state’s power to do what it otherwise could legally do—sell lands it owns—until the government discharges its obligation to resolve reparation claims to those lands linked to the “illegal overthrow.”<sup>278</sup> The language of reconciliation provides the conceptual and legal framework, while the messy yet essential grassroots political work at the ground level remains.

As the OHA Chair Haunani Apoliona recently observed,

For too long, our ancestors . . . have waited for the United States [and state of Hawaii] . . . to make right the wrong that was committed in 1893, only to see the small steps taken for our benefit persistently attacked . . . Reconciliation has been an option thus far denied.<sup>279</sup>

But with the challenges abroad to the United States’ legitimacy as a democracy committed to civil and human rights,<sup>280</sup> the United States has greater incentive to take Native Hawaiian reconciliation seriously. And the political winds of reparatory justice may be shifting with President Obama in office. As president-elect, Obama expressed deep concern about America’s loss of international stature.<sup>281</sup> He also embraced the language of healing and bridge-building.<sup>282</sup>

278. The political resolution envisioned by the Hawai’i Supreme Court would involve the state and representatives of a semi-sovereign entity of the Hawaiian people. *See OHA*, 177 P.3d at 892 n.7, 920, 923.

279. Written Testimony: Hearing on S. 147, The Native Hawaiian Government Reorganization Act Before the S. Comm. on Indian Affairs, 109th Cong. 11 (2005) (testimony of Chairperson Haunani Apoliona, Board of Trustees, Office of Hawaiian Affairs).

280. *See supra* Section IV.E.

281. *See Renewing American Diplomacy*, Foreign Policy, ObamaBiden, available at [http://www.barackobama.com/issues/foreign\\_policy/index\\_campaign.php#diplomacy](http://www.barackobama.com/issues/foreign_policy/index_campaign.php#diplomacy) (“The United States is trapped by the Bush-Cheney approach to diplomacy that refuses to talk to leaders we don’t like. Not talking doesn’t make us look tough – it makes us look arrogant, it denies us opportunities to make progress, and it makes it harder for America to rally international support for our leadership. [W]e cannot make progress unless we can draw on strong international support.”).

282. *See transcript of Obama’s speech*, available at CNNPOLITICS.COM, Mar. 18, 2008, <http://www.cnn.com/2008/POLITICS/03/18/obama.transcript/index.html>:

[I]f we simply retreat into our respective corners, we will never be able to come together and solve challenges . . . Working together we can move beyond some of our old racial wounds . . . For the African-American community, th[e] path [of a more perfect union] means embracing the burdens of our past without becoming victims of our past. . . . [.] binding our particular grievances . . . to the larger aspirations of all Americans . . . [a]nd . . . taking full responsibility for own lives . . . . In the white community, the path to a more perfect union means acknowledging that what ails the African-American community does not just exist in the minds of black people; that the legacy of discrimination . . . are real and must be addressed. Not just with words, but with deeds . . . .”

*Obama: Victory Speech*, NEW YORK TIMES, Nov. 5, 2008, available at <http://elections.nytimes.com/2008/results/president/speeches/obama-victory-speech.html>. For example, Obama focused on closing the divide created by partisan politics:

Let us remember that it was a man from this state who first carried the banner of the Republican Party to the White House—a party founded on the values of self-reliance, individual liberty and national unity. Those are values we all share, and while the Democratic

Moreover, as a presidential candidate, Obama promised support for reconstructing the United States-Native Hawaiian relationship to protect Hawaiian reparatory programs and to create some form of indigenous Hawaiian self-governance.<sup>283</sup> He observed that the “Akaka Bill” would “empower Native Hawaiians to . . . address the longstanding issues resulting from the overthrow of the Kingdom of Hawai’i.”<sup>284</sup> Obama recited the democratic values underlying his support: “As Americans, we pride ourselves on safeguarding the practice and ideas of ‘liberty, justice, and freedom.’” By passing the Akaka Bill, which Obama deemed “important legislation,”<sup>285</sup> “we can continue this great American tradition[and] . . . fulfill this promise for Native Hawaiians.”<sup>286</sup>

Many uncertainties persist. What types of meaningful *reconstruction* and comprehensive and sustained *reparation* will comprise the kind of redress that genuinely heals Native Hawaiian communities, the state, and the country? The answers will turn in part on how Hawaiians themselves coalesce and on what political and economic climates yield domestically and internationally. The answers will also be shaped by how redress is framed. If justice is framed beyond simple payment of a debt, and if the American political winds continue to blow anew and international advocacy intensifies, then the aspiration for reconciliation, even though problematic, remains. And Social Healing Through Justice offers a language and approach for articulating, organizing around, and critiquing the kind of transformative justice that heals.<sup>287</sup>

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Party has won a great victory tonight, we do so with a measure of humility and determination to heal the divides that have held back our progress.

283. See Derrick DePledge, *Democratic Convention Plans Native Hawaiian Recognition*, THE HONOLULU ADVERTISER, Aug. 24, 2008, available at <http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080824/NEWS05/808240367/1009/LOCALNEWSFRONT> (discussing the Democratic National Convention as the forum for Delegates to show support for self-determination for Native Hawaiians consistent with the 1993 Apology).

284. *Id.* (quoting Barack Obama).

Whether the pending legislation would constitute meaningful self-governance or be a sell-out by giving the federal government too much control is heatedly debated among Hawaiian groups. See Obrey, *supra* note 232. The Bush Administration opposed the Akaka Bill as a simple racial preference. See *Hawaii Divided Against Itself Cannot Stand*, HAWAI’I REPORTER, available at <http://www.hawaiireporter.com/story.aspx?title=Hawaii+Divided+against+Itself+Cannot+Stand>; Borreca, *supra* note 266. Others opposing the bill argue that it gives too much control to the Department of the Interior and undermines Native Hawaiian self-determination. See B.J. Reyes, *Hawaiian Group Rallies at Palace Against Akaka Bill*, HONOLULU STAR-BULLETIN (July 21, 2005), available at <http://starbulletin.com/2005/07/21/news/story2.html#jump>. Supporters—including Hawai’i Governor Linda Lingle, the Council for Native Hawaiian Advancement, and the Alaska Federation of Natives—back the bill to protect programs assisting Native Hawaiians including the Office of Hawaiian Affairs, Hawaiian Homesteads, and the Kamehameha Schools). See also Professor Mark. A. Levin, Presentation at the Center for Ainu and Indigenous Studies, Hokkaidō University (July 14, 2007) (on file with author).

285. *Id.*

286. *Id.*

287. See generally David Barnard, *Law, Narrative, and the Continuing Colonialist – Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 44 (2006).

## VI. THE IMPACT OF INTERNATIONAL SCRUTINY ON DOMESTIC REDRESS INITIATIVES:

### THE REJUVENATED AINU-JAPAN SOCIAL HEALING EFFORTS

But what if proposed reparatory measures remain partial rather than comprehensive? What if a government and its mainstream populace express a desire to heal the wounds of the past but decline to recognize and act upon the full range of continuing psychological and material harms? How can redress advocates restart or accelerate the social healing process?

One response to these questions lies in how shifting geopolitical forces sometimes realign a democratic country's otherwise reluctant interest in redressing its civil and human rights abuses. A country's quest for enhanced international stature can shape that country's evolving responses to redress claims. The halting yet rejuvenated indigenous Ainu and Japanese government redress initiative illuminates this dynamic,<sup>288</sup> revealing how shifting geopolitical concerns influence Social Healing Through Justice. Applying the framework to the Ainu-Japan initiative offers insight into the future volatility as well as salutary potential of American reconciliation initiatives.

### *A. Legal Subordination and a Promise of Repair*

#### *1. Overview*

Despite over a century of colonization—encompassing almost total confiscation of Ainu land, culture destruction and harsh discrimination<sup>289</sup>—the Japanese government persistently denied that the Ainu were harmed as “indigenous people” with claims to human rights—that is, until 2008.<sup>290</sup> After twenty-five years of Ainu organizing and agitation with the support of local leaders and international human rights scholars and advocates,<sup>291</sup> following a local Japanese court's acknowledgment of Ainu human rights<sup>292</sup> and the 2007 United Nation's Declaration on the Rights of

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288. For the leading scholarship on Ainu issues, see Levin, *Essential Commodities*, *supra* note 23; Teruki Tsunemomo, *Constitutional and Legal Status of the Ainu in Japan: A National Report* (presented at the XVth Congress of the International Academy of Comparative Law, Brisbane, Australia, July 2002) (on file with authors); Hasegawa, *supra* note 256.

289. See Rice, *supra* note 256, at 3-7, 11.

290. On June 6, 2008, the Japanese Diet unanimously passed a resolution to recognize the Ainu as an indigenous people. JAPAN, THIRD, FOURTH, FIFTH AND SIXTH COMBINED PERIODIC REPORT ON THE IMPLEMENTATION OF THE INTERNATIONAL CONVENTION ON ELIMINATION OF RACIAL DISCRIMINATION 7 (2008), available at [http://www.mofa.go.jp/policy/human/race\\_rep3.pdf](http://www.mofa.go.jp/policy/human/race_rep3.pdf).

291. See *A Statement of Opinion Regarding the Partial Revision of I.L.O. Convention No. 107*, available at <http://cwis.org/fwdp/Eurasia/ainu.txt>.

292. *Kayano v. Hokkaidō Expropriation Committee* 1598 Hanrei Jiho 33, 938 Hanrei Times 75 (Sapporo Dist. Ct., Mar. 27, 1997) (Japan), reprinted in 38 I.L.M. 394, 423-4 (Mark A. Levin trans., 1999) [hereinafter *Nibutani Dam Decision*]. When the Hokkaidō Development Agency publicized its plan to build a major dam on the Saru River in Nibutani, one of the few remaining ancestral Ainu



Indigenous Peoples,<sup>293</sup> the Japanese government formally recognized the Ainu as indigenous people in 2008.<sup>294</sup>

The Japanese government for the first time is contemplating sustained steps toward repairing some of the generations-long damage to the Ainu people.<sup>295</sup> Yet many Ainu and others are wary<sup>296</sup>—past initiatives have been piecemeal at best, and the national government still appears to reject human rights reparatory remedies.<sup>297</sup> Indeed, many Ainu express a continuing need for Japan to fully acknowledge responsibility for the lasting harms of 100 years of colonization. Further, the Ainu are demanding a far wider and deeper program of reparations, including return of lands, economic self-sufficiency and partial restoration of self-governance.<sup>298</sup> They worry that Japan's recent pronouncement is less about Ainu justice and more about restoring Japan's damaged international stature.<sup>299</sup>

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villages, two Ainu refused to surrender their land. *See id.* at 399. The Hokkaidō Land Expropriation Committee decided that the Hokkaidō Development Agency could sequester the land under the Eminent Domain Law. *See id.* at 400-01. The Ainu advocates sued. In 1997, the District Court found that the Committee's decision to take Ainu land was illegal. *See id.* at 427. More significantly, the local court declared that the Ainu are the indigenous people of Hokkaidō. *See id.* at 420. The court noted that Ainu people have the right as indigenous people to the pursuit of happiness and the right to enjoy their culture as guaranteed by Article 13 of the Constitution of Japan and Article 27 of the International Covenant on Civil and Political Rights. *See id.* at 417-19. The Nibutani Dam decision destroyed old Japanese narratives of a "homogenous Japan." *See* Levin, *Essential Commodities*, *supra* note 23, at 501. *See generally* Hom & Yamamoto, *Collective Memory*, *supra* note 240 (viewing historical perspectives as narratives).

The ultimate legal outcome, however, "rendered the legal content of Article 27 and the constitutional protections as mere rhetoric." Georgina Stevens, *More Than Paper: Protecting Ainu Culture and Influencing Japanese Dam Development*, CULTURAL SURVIVAL QUARTERLY (Dec. 15, 2004), available at <http://www.culturalsurvival.org/ourpublications/csqa/article/more-than-paper-protecting-ainu-culture-and-influencing-japanese-dam-dev>. The court chose not to stop dam construction because "public interest" mandated its completion. *See* Nibutani Dam decision. For an in-depth critique of the decision in context, see the seminal article by Professor Mark Levin, *Essential Commodities*, *supra* note 23, at 455-66.

293. Declaration on the Rights of Indigenous Peoples, *supra* note 136. Japan was one of 143 member states that voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples in 2007. *See* United Nations Press Releases and Meetings Coverage, *General Assembly Adopts Declaration on Rights of Indigenous Peoples*, available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm> (last visited Oct. 7, 2009).

294. *See infra* Section VI.B.

295. *See infra* Section VI.A.

296. *See* Tsunemomo, *supra* note 288.

297. *See infra* Section VI.

298. *See* Interview with Kenichi Ochiai, University of Hokkaido School of Law, at Honolulu, Haw. (Sept. 29, 2008) [hereinafter Interview with Kenichi Ochiai] (explaining that the young generation of Ainu are seeking land and political reform and not just monetary reparations).

299. *See* Leon Hollerman, *Japan's Quest for a Permanent Security Council Seat: A Matter of Pride or Justice?*, PACIFIC AFFAIRS (2002).

## 2. History

The Ainu people have been harmed in the systemic ways that indigenous peoples throughout the world, like Native Hawaiians, have been damaged by former colonial powers.<sup>300</sup> Colonization devastated their indigenous culture and language, exploited natural resources, appropriated land, undermined self-governance and inflicted lasting psychological harms.<sup>301</sup> Colonization also damaged modern Japanese society as evidenced by how the nation now professes a commitment to human rights. Japan's Justice Ministry publicly reaffirmed this commitment as part of Japan's current push to acquire a permanent seat on the United Nations Security Council.<sup>302</sup> Yet, taking indigenous Ainu homelands, suppressing Ainu culture and destroying economic and political self-governance are stark human rights violations.<sup>303</sup>

Systemic racial discrimination is also a human rights violation,<sup>304</sup> as is a government's failure to remedy serious human rights harms.<sup>305</sup> Even though courts almost never enforce a country's human rights obligations, as mentioned earlier, highly-publicized unredressed human rights abuses damage a country's stature as a democracy in the eyes of international communities.<sup>306</sup>

300. ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (1965). The Ainu were rooted to the lands of northern Japan before recorded time. See Rice, *Ainu Submergence and Emergence*, *supra* note 256, at 4. A distinct people with their own religion, language, culture, and law inherently and harmoniously connected to nature, they depended on their environment. See Tsunemomo, *supra* note 288. Like many indigenous groups, Ainu livelihood consisted of hunting, fishing, and gathering. See *id.* For centuries, the Ainu and Japan's dominant Wajin engaged in prosperous trade and occasional warfare. See *id.* But these societal practices played out on a field of perceived inequality.

301. See MEMMI, *THE COLONIZER AND THE COLONIZED*, *supra* note 300. In 1868, the long-term Japanese colonization project commenced. Foreigners arrived to establish agriculture and industry in the area. See Rice, *Ainu Submergence and Emergence*, *supra* note 256, at 5. The Hokkaidō Colonization Office consulted with American advisors from the Bureau of Indian affairs to draft administrative policy and encouraged Wajin to settle Hokkaidō and forced the Ainu to infertile or marshy land. See *id.* at 4-5.

Changes to the landscape forced change upon the people. Ainu men were "advised" to shave their bears and tie back their hair. See *id.* Women were banned from applying traditional blue facial tattoos. See *id.* Laws limited Ainu rights to natural resources—including their ceremonial annual catch of salmon—and the Japanese exploitation of resources led to starvation in many villages. See *id.* The Ainu battled disease, debt, violence, and poverty. See *id.* Traditional knowledge, language, cultural practices broke down, and suicide became a common fate. See SIDDLE, RACE, RESISTANCE AND THE AINU, *supra* note 23, at 67. The Ainu's way of life as they once knew it nearly vanished within a couple of generations. See *id.* at 59.

302. See Hiroko Tabuchi, *Japan's Security Council Seat Less Likely*, THE SEATTLE TIMES, Apr. 24, 2005, available at [http://seattletimes.nwsources.com/html/nationworld/2002450215\\_japan24.html](http://seattletimes.nwsources.com/html/nationworld/2002450215_japan24.html) (discussing "Japan's long-standing dream of a permanent seat on the U.N. Security Council").

303. See generally Anaya, *supra* note 198.

304. United Nations International Convention on the Elimination of All Forms of Racial Discrimination, A/RES/2106(XX), Jan. 4, 1969, <http://daccesssdds.un.org/doc/RESOLUTION/GEN/NR0/218/69/IMG/NR021869.pdf?OpenElement>.

305. See *id.*

306. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at

Following the controversial Nibutani Dam decision<sup>307</sup> and Japan's assent to the U.N. Convention on the Elimination of All Forms of Racial Discrimination,<sup>308</sup> and with a supportive prime minister, Japan's Parliament in 1997 repealed the oppressive 1899 Ainu Assimilation Act ("Hokkaidō Former Aborigines Protection Act").<sup>309</sup> The Parliament enacted the limited Ainu Cultural Promotion Act.<sup>310</sup>

Yet, until very recently, there has been little sense of a genuine Ainu-Japan redress and no satisfactory healing of the persisting wounds of historic colonization. That is why some can say, "It is the modern Japanese state that . . . usurped our land, destroyed our culture, and deprived us of our language under the euphemism of assimilation"<sup>311</sup>—and the Ainu are still seeking justice.

This is why another Ainu justice advocate would say:

The Ainu are Japan's dirty secret. They are referred to as "former aborigines" a hidden shame that threatens to disrupt Japan's colonial myth of cultural [and ethnic] uniformity.<sup>312</sup>

Even though culture is important, "the Ainu Cultural Protection Law failed to recognize land or resource rights, or indigenous representation in central or local government . . . . [T]he Ainu are struggling for recognition of fishing and forestry rights, and the creation of the 'Ainu Independence Fund.'"<sup>313</sup> The Culture Protection law "only supports the protection of Ainu cultural artifacts and language . . . [mostly by] non-indigenous anthropologists and linguists."<sup>314</sup>

By deliberately refusing to recognize the Ainu as an "indigenous people" the 1997 Culture Promotion law strips the Ainu of indigenous human rights to self-governance, economic development, cultural perpetuation and to reclaim homelands.<sup>315</sup>

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63-64.

307. See *supra* note 292.

308. United Nations Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 304.

309. See Levin, *Essential Commodities*, *supra* note 23, at 437, 467-68.

310. See Ainu Bunka no Shinko narabini Ainu no DentEo-tEo ni Kan suru Chishiki no Fukyu oyobi keihatsu ni kan suru Horitsu [Act for the Promotion of Ainu Culture & Dissemination of Knowledge Regarding Ainu Tradition], Law No. 52 of 1997 (Japan), translated in 1 ASIAN-PAC. L. & POL'Y J. 11 (Masako Yoshida Hitchingham trans., 2000), available at [http://www.hawaii.edu/aplpj/articles/APLPJ\\_01.1\\_hitchingham\\_masako.pdf](http://www.hawaii.edu/aplpj/articles/APLPJ_01.1_hitchingham_masako.pdf) [hereinafter Culture Promotion Law].

311. Toshiaki Sonohara, *Toward a Genuine Redress of an Unjust Past: The Nibutani Dam Case*, MURDOCH UNIVERSITY ELECTRONIC JOURNAL OF LAW, Vol. 4, No. 2 (1997), available at <http://www.murdoch.edu.au/elaw/issues/v4n2/sonoha42.html#t2> (quoting KAYANO SHIGERU, OUR LAND WAS A FOREST: AN AINU MEMOIR 153 (1994)).

312. See Tyson Yunkaporta, *The Ainu and Japanese Modernity: The Assimilation and Ethnocide of Japan's Aborigines*, ASIAN INDIGENOUS POLITICS, SUITE101.COM (July 4, 2007), available at [http://asian-indigenous-peoples.suite101.com/article.cfm/the\\_ainu\\_and\\_japanese\\_modernity](http://asian-indigenous-peoples.suite101.com/article.cfm/the_ainu_and_japanese_modernity).

313. *Id.*

314. *Id.*

315. See *id.*

The 2006 U.N. Special Reporter on Racism supported the critical assertions of Ainu justice advocates. The Reporter found that today's Ainu face continuing discrimination in employment, housing, and education<sup>316</sup> which drastically affect their daily lives as well as their long-term prospects.<sup>317</sup> The Reporter also indicated that this discrimination is an extension of the long-standing colonialist characterization of the Ainu as less civilized and less worthy<sup>318</sup>—they were called “incestuous people, living in holes and nests, who ‘drink blood,’ have supernatural animal-like physical powers” (the kind of typical characterization of indigenous people that all colonial powers deployed to legitimate land conquest).<sup>319</sup>

Yet, there is another compelling reason for critical sentiments. Something more is at stake than inequality. International courts recognize systemic racial discrimination as a human rights violation.<sup>320</sup> Highly-publicized unredressed human rights abuses damage a country's stature as a democracy in the eyes of international communities.<sup>321</sup> Japanese society itself has been damaged because the nation professes its commitment to

316. In 2005, Doudou Diene, Special Rapporteur of the Commission on Human Rights on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, assessed the situation of minorities and foreigners in Japan. U.N. Econ. & Soc. Council [ECOSOC], Commission on Human Rights, Racism, *Racial Discrimination, Xenophobia and All Forms of Discrimination: Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Intolerance, Addendum, Mission to Japan* ¶ U.N. Doc. E/CN.4/2006/16/Add.2 6 (Jan. 24, 2006) (prepared by Doudou Diene) [hereinafter Diene Report]. The Diene report found “disparate levels of education, social welfare, health, employment, legal services and discrimination” and described how prejudice has been sustained over years. Kanako Uzawa, *The Ainu of Japan: Political Situation and Rights Issues*, ARCTIC NETWORK FOR THE SUPPORT OF THE INDIGENOUS PEOPLES OF THE RUSSIAN ARCTIC, Apr. 2007, available at <http://www.npolar.no/ansipra/english/items/Japan-1.html>.

317. Citing to the 1999 Hokkaidō survey, the Diene report noted that just over twenty-eight percent of people interviewed experienced or knew someone who had experienced discrimination. See *id.* One Ainu scholar describes the two Ainu “strategies” publicized in the report:

One is that educating the general population about the Ainu is the key to tackling discrimination; many Japanese, especially on the main island, do not know anything about the Ainu. Second, it is crucial that the Ainu are recognized as an indigenous people. The Law for the Promotion of the Ainu Culture and for the Dissemination and Advocacy for the Traditions of the Ainu and the Ainu Culture of 1997, which only promotes Ainu culture, is not sufficient in this respect.

Uzawa, *supra* note 316. Ainu experience discrimination most often at school, the workplace, and in finding a marriage partner. See Tsunemono, *supra* note 288. Discrimination against Ainu children at school potentially affects the entire family at home – sometimes “forcing” the family to move to another region. See *id.* Although the persistence of the most virulent discrimination has subsided and the younger generations have become proud of their heritage, Professor Mutsuo Nakamura of Hokkaidō University observes that discrimination has compelled many Ainu to continue to hide their identity, even from their own families. See Hasegawa, *supra* note 256, at 4. The census population of 24,000 Ainu in Japan includes only those who declare their Ainu ancestry, but a better estimate is 30,000 to 50,000. See Diene Report, *supra* note 316, at 5.

318. *Id.*

319. Levin, *Essential Commodities*, *supra* note 23, at 329 (citing SIDDLE, *supra* note 23, at 27).

320. United Nations International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 304.

321. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12.

human rights. Japan's Justice Ministry publicly reaffirmed this commitment as part of Japan's current push to acquire a permanent seat on the United Nations Security Council.<sup>322</sup> What is at stake is Japan's apparent failure to live up to its promise of redress.<sup>323</sup> Like the United States and State of Hawai'i's treatment of Native Hawaiians, this shortfall reflects an incomplete or even failing effort at Social Healing Through Justice. It also reveals an as yet unrealized and increasingly shaky commitment to democracy through human rights. The Four R's of Social Healing Through Justice help explore this over-arching failure to date and its consequences, and they provide a way to chart a future strategic path.

### *B. A Reparatory Justice Critique*

Until mid-2008, the Japanese government refused to *recognize* the Ainu as an indigenous people. The 1997 Culture Promotion Law deliberately omitted that acknowledgment—it aimed solely to respect Ainu ethnicity.<sup>324</sup> That omission of indigenous status erected a major obstacle to social healing: it represented the denial of the Ainu's unique identity and their standing as a native people among world communities.<sup>325</sup> That omission meant that the Ainu, treated as an ethnic minority, could only legally pursue claims of discrimination (unequal treatment) against the government.<sup>326</sup> The Ainu could not claim, as indigenous people, the denial of a right to self-governance or reclaim lands and resources and to preserve culture. This stands in contrast to the Native Hawaiians, whose indigeneity was recognized by state and federal governments.<sup>327</sup> The Ainu lacked standing to claim restoration of some meaningful form of their ancestral "iwore."<sup>328</sup> No *recognition* of indigenous status meant little acknowledgment of what matters and little chance of genuine social healing.

The government's refusals to *recognize* also reflected a denial of *responsibility* for the full range of long-term harms to the Ainu. Japan's 1997 Culture Promotion law only committed to promoting certain aspects of Ainu culture, unlike the United States' comprehensive Joint Reconciliation report which committed the United States to healing the multi-dimensional wounds of Native Hawaiians.<sup>329</sup> Japan's 1997 law encouraged a rebirth of Ainu language, fostered the search for former Ainu

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322. See Hiroko Tabuchi, *supra* note 302.

323. See *supra* Introduction.

324. See Levin, *Essential Commodities*, *supra* note 23, at 467-68.

325. See Yunkaporta, *supra* note 312.

326. See *supra* note 164, 199.

327. See *supra* notes 201-206 (describing indigenous rights to land, welfare and self-governance).

328. See *infra* note 399 (describing the significance of the "iwore" to Ainu communities).

329. See Culture Promotion Law, *supra* note 310.

communal lands, and helped locate and preserve Ainu artifacts.<sup>330</sup> These are all positive developments. But the 1997 law denied responsibility for restoring formerly productive Ainu lands – originally taken to expand Japan's territory and later to foster national economic growth – or for placing similar lands into an Ainu trust.<sup>331</sup> It also denied responsibility for assuring access for traditional cultural practices (like forestry and salmon fishing), for guaranteeing the Ainu a political voice in the national government, and for assuring Ainu local control over culture and economic development.<sup>332</sup>

Equally important, Japan avoided taking responsibility for characterizing the Ainu as inferior and unworthy—cultural characterizations that historically legitimated colonization.<sup>333</sup> Collectively, even with the 1974 Utari Welfare Measures Act<sup>334</sup> and recent payments to some Ainu individuals whose land was taken (lands undervalued as of the time of taking, not according to present value),<sup>335</sup> they reflect Japan's failure to accept responsibility for sustained, systemwide harms.

The failures of full recognition and responsibility explain, but do not excuse, why there have been inadequate efforts to *reconstruct* the Japan-Ainu political relationship. (The Ainu people are no longer concentrated in one area; the same is true for Native Hawaiians).<sup>336</sup> And some, because of discrimination, feel compelled to hide their Ainu ancestry – as was the case for indigenous Hawaiians.<sup>337</sup> However, an indigenous peoples' claims to some form of self-governance (or at a minimum, representation in a national government) are not dependent on all living in one locale—

330. Interview with Ken'ichi Ochiai, *supra* note 298.

331. See Culture Promotion Law, *supra* note 310.

332. See *id.*

333. By asserting these ostensible differences between groups, portraying one as valuable and the other as less, and then generalizing this hierarchy to the entire "lesser" group, the colonizer characterizes the colonized as the inferior "other" and thereby justifies its privilege over or violence towards the colonized. In essence, race is used to legitimate an act of economic and political conquest. See Albert Memmi, ATTEMPT AT A DEFINITION, IN *DOMINATED MAN: NOTES TOWARD A PORTRAIT* 186 (1968); MEMMI, *THE COLONIZER AND THE COLONIZED*, *supra* note 300; Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 262 (1989) (applying Memmi's framework to Native Americans); Amicus Brief of the Japanese American Citizens League of Hawai'i-Honolulu Chapter, Centro Legal De La Raza, and the Equal Justice Society in Support of Defendants-Appellees' Petition for Rehearing En Banc, *Doe v. Kamehameha* (No. 03-00316-ACK), at 8-9, available at [http://www.ksbe.edu/pdf/amicus\\_ejs.pdf](http://www.ksbe.edu/pdf/amicus_ejs.pdf). (applying Memmi's framework to Native Hawaiians); Barnard, *supra* note 287, at 14-26.

334. Between 1974 and 2001, Hokkaidō conducted Hokkaidō Utari Welfare Measures "to improve the Ainu people's social and economic situation" *Promotion of Ainu Culture*, Hokkaidō Bureau, Ministry of Land, Infrastructure, Transport and Tourism (2006), available at [http://www.mlit.go.jp/hkb/ainu\\_e.html](http://www.mlit.go.jp/hkb/ainu_e.html). See Rice, *supra* note 256, at 6.

335. See *id.*

336. Interview with Ken'ichi Ochiai, *supra* note 298.

337. See Diene Report, *supra* note 316, at 5, 9.

especially when ancestral lands were taken and people dispersed.<sup>338</sup>

In light of the history of Ainu disenfranchisement and economic dispossession, Ainu advocates requested guaranteed Ainu national political representation<sup>339</sup>—but this was rejected.<sup>340</sup> The Ainu Independence Fund, requested by Ainu people to provide a self-governed economic base—also rejected.<sup>341</sup> In addition, recent calls for a national law explicitly prohibiting racial discrimination against the Ainu and others as a means for reconstructing group relationships in Japanese society<sup>342</sup> stalled indefinitely.<sup>343</sup> Nor has there been a full genuine official national apology.

The regional Hokkaidō government has taken some positive steps in response to Ainu organizing. Some original Ainu land names have been restored.<sup>344</sup> Ainu language is promoted, festivals held and high school curriculum on the Ainu taught.<sup>345</sup>

Nevertheless, without national and local *reconstruction* of political and economic relationships to respond to the systemic harms of colonialism, there will not likely be the kind of justice that fosters social healing. Without engagement at all levels of government and throughout the community, reconstruction will likely be temporary or illusory—and the pain, dislocation, and social division will persist. The *reconstruction* dimension of social healing highlights these consequences of government inaction (or incomplete action).

*Reparations*, as they overlap with reconstruction, are essential to healing to ensure that the reconciliation process is more than empty political words.<sup>346</sup> Japan's 1997 Cultural Promotion law promoted aspects of Ainu culture to repair the damage of past cultural suppression.<sup>347</sup> But, unlike the continuing piecemeal Congressional efforts at reparation for Native Hawaiians, this is where the reparatory efforts stopped. No restoration of productive ancestral lands (either directly to individuals or

338. See generally Declaration on the Rights of Indigenous Peoples, *supra* note 136.

339. See [Ainu Shinpō] (Translation of principal draft, as proposed by Ainu Association of Hokkaidō in May 1984, available in SIDDLE, *supra* note 23, at 196-200.

340. The Culture Promotion Law was enacted instead. See Levin, *Essential Commodities*, *supra* note 23, at 467.

341. Yunkaporta, *supra* note 312.

342. See Ainu Shinpō, *supra* note 339.

343. Interview with Ken'ichi Ochiai, *supra* note 298.

344. Yugo Ono, Graduate Scholar in Environmental Earth Science at Hokkaidō University, Presentation at Native Hawaiian Rights, William S. Richardson School of Law, Honolulu, Hawai'i, *Recovering Ainu's Rights in the Shiretoko World Natural Heritage Area through Indigenous Eco-tourism* (Mar. 5, 2008). After initial missteps, the local Japanese government participated in this project by creating signs in important places listing both their Japanese and traditional Ainu names. *Id.*

345. See Levin, *Essential Commodities*, *supra* note 23, at 468.

346. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 112, at 203. See also Ana Filipa Vrdoljak, *Reparations for Cultural Loss, Reparations for Indigenous Peoples: International and Comparative Law Perspectives in REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES* 198 (F. Lenzerini ed., 2008).

347. See Culture Promotion Law, *supra* note 310.

into a native trust) or fair compensation for takings.<sup>348</sup> Little or no control over<sup>349</sup> or benefit from formerly native resources.<sup>350</sup>

The Japanese government failed to create an Independence Fund to support Ainu businesses and economic development,<sup>351</sup> provide direct support for Ainu access to higher education,<sup>352</sup> or even offer direct symbolic payments to Ainu families (every surviving Japanese American wrongfully imprisoned by the U.S. during World War II received a presidential apology and a \$20,000 symbolic payment).<sup>353</sup>

The Four R's of Social Healing Through Justice thus offer a framework for ascertaining why Japan's repair efforts through mid-2008 have been experienced as starkly incomplete and insufficient. The wounds persist. Although individually important, the efforts do not form a comprehensive, sustained, and systemwide program of repair for the lasting damage of indigenous Ainu subordination. Similar to United States-Native Hawaiian reconciliation efforts in the 1990s, what appeared to be a good start in 1997 toward peaceable and productive Japan-Ainu relations ended prematurely, or at least stalled, far short of generating the kind of resonance of "justice done" that fosters social healing.

Yet, as discussed in the next section, human rights organizing and lobbying from many geopolitical directions in the summer of 2008 pushed the Ainu back into governmental consciousness and compelled Japan to reverse course. Japan's parliament for the first time acknowledged the Ainu as indigenous people and partially opened new doors to future social healing.<sup>354</sup>

In doing so, it raised new questions about Social Healing Through Justice. Will Japan fully recognize Ainu human rights? Will Ainu lives improve, spiritually and materially? More broadly, what will the Ainu-Japan reparatory landscape look like at the turn of the second decade of the millennium as Japan seeks to temper China's growing economic and military power,<sup>355</sup> to regularize relations with North and South Korea,<sup>356</sup>

348. Cf. Ainu Shinpō, *supra* note 339.

349. Cf. *id.*

350. Cf. *id.*

351. Cf. *id.*; see also Yunkaporta, *supra* note 312.

352. Cf. Ainu Shinpō, *supra* note 339.

353. See Ainu Shinpō, *supra* note 339. See also Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988).

354. See *infra* Section VI.

355. "As China speeds towards economic parity with the Japanese heavyweight, competition for resources and markets is growing. Both wish to match their economic prowess with leading roles in world diplomacy." *China & Japan Rival Giants: Introduction*, BBC NEWS, Mar. 8, 2006, available at [http://news.bbc.co.uk/2/shared/spl/hi/asia\\_pac/05/china\\_japan/html/introduction.stm](http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/05/china_japan/html/introduction.stm).

356. Since 1998, when South Korean President Kim Dae Jung visited Japan and proposed building a new bilateral relationship, Japan and South Korea have sporadically pursued a joint goal of: 1) promotion of investment; 2) promotion of trade; and 3) promotion of cultural exchange. As a result, the two governments set up the 21<sup>st</sup> Century Japan-Korea Economic Relations Study Team. IPPEI YAMAZAWA, TOWARD CLOSER JAPAN-KOREA ECONOMIC RELATIONS IN THE 21<sup>ST</sup> CENTURY (2000), [http://www.ide.go.jp/English/Lecture/Sympo/pdf/kankoku\\_soron.pdf](http://www.ide.go.jp/English/Lecture/Sympo/pdf/kankoku_soron.pdf).



and to solidify its international influence on the U.N. Security Council?<sup>357</sup>

Because the Ainu-Japan healing thus far has consisted of a delayed recognition of Ainu indigeneity, limited acceptance of Japan's responsibility for healing, and minimal attempts at reconstruction and reparation, the Social Healing Through Justice framework points toward incomplete and possibly failing redress. Yet, the framework also underscores prospects for rejuvenation. It indicates that Japan's concern for democratic legitimacy in the face of strong international criticism of its unredressed human rights abuses may trigger important advances in redress. That dynamic emerged into public view in mid-2008.<sup>358</sup>

### *C. Geopolitical Redress Dynamics:*

#### *Legitimacy as a Democracy Committed to Civil and Human Rights?*

In 2008, geopolitical forces triggered what may become a major shift in Ainu-Japan political relations. As Japan lobbied for a permanent seat on the United Nations Security Council and an expanded military presence in Asia, it faced heated criticism from neighboring countries and American organizations about its dismal record of human rights abuses and its refusal to address continuing harms.<sup>359</sup> Amid this human rights clamor, and with Japanese leaders' rhetoric of healing as backdrop,<sup>360</sup> Ainu calls for justice gained political traction. In May 2008, thousands of Ainu demonstrated in Tokyo, demanding recognition of the Ainu as an indigenous people.<sup>361</sup> Hideo Akibe, a leading Ainu rights campaigner and protest organizer, set the political tone:

Japan can set a good example for the entire planet . . . . It has taken a long time to get where we are. I mean Japan is a country that has not very smart lawmakers who say it is a racially homogenous nation. But for us, [being recognized as indigenous] is just the beginning.<sup>362</sup>

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357. See generally ALEXEI KRAI, JAPAN'S QUEST FOR A PERMANENT UN SECURITY COUNCIL SEAT (1999), available at [http://www.wilsoncenter.org/index.cfm?fuseaction=events.event\\_summary&event\\_id=3793](http://www.wilsoncenter.org/index.cfm?fuseaction=events.event_summary&event_id=3793).

358. See *infra* Section V.C.

359. See *infra* Section VI (discussing Japan's incomplete reparatory efforts); Takehiko Kambayashi, *Hokkaidō's Ethnic Tribe Gets Recognition*, WASHINGTON TIMES, Aug. 8, 2008, <http://www.washingtontimes.com/news/2008/aug/08/hokkaidos-ethnic-tribe-gets-recognition/>; Erik Larson, Zachary Johnson and Monique Murphy, *Emerging Indigenous Governance: Ainu Rights at the Intersection of Global Norms and Domestic Institutions*, 33 ALTERNATIVES 53, 72 (2008) (the government "was taking an increasing interest in Ainu issues because 'they recognized the international circumstances about indigenous people.'").

360. See *Excerpts from Japan PM's Apology*, *supra* note 106 (then-Prime Minister Koizumi invoked the language of reconciliation in reaction to claims of Japan's historical human rights abuses). See generally Sheu, *Clash of Asia's Titans*, *supra* note 106.

361. Catherine Makino, *Indigenous People: Japan Officially Recognises Ainu*, INTER PRESS SERVICE NEWS AGENCY, Jun. 11, 2008, <http://ipsnews.net/news.asp?idnews=42738> (last visited Oct. 7, 2009).

362. Masami Ito, *Ainu Press Case for Official Recognition*, JAPANTIMES, May 23, 2008, available

Building on years of organizing against rejection, that protest preceded by two months of the internationally-scrutinized 2008 Group of Eight Summit<sup>363</sup>—a convening of the world's eight economic powers in the Ainu's former homeland of Hokkaidō.<sup>364</sup> The 2008 Summit planned to focus on not only economic planning but also issues integral to Ainu lands and culture, including climate change and environmental sustainability. A new generation of Ainu advocates<sup>365</sup> and international groups stepped up criticism of Japan's Ainu human rights record.

Then, in a startling apparent pre-emptive maneuver one month before the Summit, Japan's parliament unanimously passed a resolution recognizing the Ainu as an "indigenous people with a distinct language, religion and culture."<sup>366</sup> In light of Japan's history of official statements characterizing the Japanese as a homogenous people and denying Ainu indigeneity,<sup>367</sup> this recognition was met with both welcome and skepticism.

Chief Cabinet Secretary Nobutaka Machimura officially embraced the Resolution in the language of ethnic equality,<sup>368</sup> indicating that the Japanese "government would like to solemnly accept the historical fact that many Ainu people were discriminated against and forced into poverty with the advancement of modernization, despite being legally equal to [Japanese] people."<sup>369</sup> Critics, however, asserted that Machimura's "studiously vague" words<sup>370</sup> failed to reflect any major change in the government's negative position on Ainu human rights.<sup>371</sup> Indeed, Machimura revealed that Japan

at <http://search.japantimes.co.jp/cgi-bin/nn20080523a4.html>.

363. The G8 Summit members are France, Germany, United States, Britain, Italy, Japan, Canada and Russia. Generally, the Summit focuses primarily on economic concerns. Recently, the forum expanded to include global warming and other environmental issues. See NewYorkTimes.Com, *Group of 8*, [http://topics.nytimes.com/top/reference/timestopics/organizations/g/group\\_of\\_eight](http://topics.nytimes.com/top/reference/timestopics/organizations/g/group_of_eight).

364. See *id.*

365. Interview with Ken'ichi Ochiai, *supra* note 298.

366. *Ainu minzoku wo senjyuuminzoku to surukoto wo motomeru ketsugi* [Resolution to Recognize the Ainu as an Indigenous People], H20.6.6, 169th Sess., available at <http://www.ipsnews.net/search.shtml> (search performed for "indigenous people") (last visited Sept. 17, 2008). This was the Diet's first resolution addressing the Ainu people.

367. In October 2005, Japan's foreign minister, Aso Taro, reiterated Nakasone's sentiments on behalf of Japan, declaring Japan to be "one nation, one civilization, one language, one culture, and one race. There is no other nation [with such characteristics]." Rice, *supra* note 256, at 10.

368. See Masami Ito, *Diet Officially Declares Ainu Indigenous*, JAPANTIMES, Jun. 7, 2008, available at <http://search.japantimes.co.jp/print/nn20080607a1.html>. Also, Takashi Sasagawa, senior lawmaker of ruling Liberal Democratic Party said many people "had wrong ideas" about the Ainu and that "[this] historic, courageous decision is significant in reversing those wrong ideas." *Japan Recognises Indigenous People*, AFP, June. 6, 2008, <http://afp.google.com/article/ALeqM5j2cftdRCW2lp5xBwAXSH2YYfGw>.

369. *Id.*

370. Norimitsu Onishi, *Recognition for a People Who Faded as Japan Grew*, NIBUTANI JOURNAL, July 3, 2008, available at <http://www.nytimes.com/2008/07/03/world/asia/03ainu.html>.

371. The government historically denied that the Ainu are an indigenous people. Recent Prime Minister Nakasone referred to Japan as an ethnically "homogenous" nation. See Rice, *supra* note 256, at 2.

rejected the approach to defining “indigenous people” adopted by the U.N. General Assembly through the U.N. Declaration on the Rights of Indigenous Peoples.<sup>372</sup> Others observed that Machimura, and the Resolution itself, was silent on issues of primary Ainu concern, including Ainu land claims<sup>373</sup> and a full government apology.<sup>374</sup> Still others voiced mixed sentiments.<sup>375</sup> A leader of the Ainu Association of Hokkaidō conveyed appreciation, but observed that “[the parliamentary resolution] offers no legal protection, and carries no obligations for the state.”<sup>376</sup>

In July 2008, the Japanese government, to avoid the prospect of “all words and no action,” and to follow the Resolution’s dictates, established the “Advisory Panel of Eminent Persons on Policies for the Ainu People” to formulate national and local government Ainu policies. Addressing a primary Ainu concern, Machimura advised the Panel that the government “would like to work for the establishment of a new comprehensive policy toward the Ainu by referring to related articles of the U.N. Declaration [on the Rights of Indigenous Peoples].”<sup>377</sup> After conducting on-site studies in Hokkaidō and remaining Ainu communities,<sup>378</sup> the panel planned to issue a report to the Chief Cabinet Secretary in 2009.<sup>379</sup>

372. See e.g. Ito, *Diet Officially Declares Ainu Indigenous*, *supra* note 368.

373. See Makino, *supra* note 361. Although the Resolution referred to the U.N. Declaration on the Rights of Indigenous Peoples, the Resolution did not mention the Declaration’s treatment of land claims or economic self-sufficiency. The Resolution recited:

The government would like to take this opportunity to promptly put the following policies into motion:

1. *Using the United Nations Declaration on the Rights of Indigenous Peoples* the government will approve that the Ainu people are indigenous people of Northern Islands of Japan, largely Hokkaido, and that they are a *people that have their own language, religion, culture and individuality*.

2. *Because the United Nations Declaration on the Rights of Indigenous Peoples has been resolved*, the government will use examples of associated rules and the advice of knowledgeable parties to review the measures that have already been proposed for the Ainu People and *establish comprehensive new policies*.

Resolution to Recognize the Ainu as an Indigenous People, *supra* note 366. According to Professor Hideaki Uemura, an expert in indigenous peoples’ rights, “[t]he resolution is weak in the sense of recognizing historical facts,” Ito, *Diet Officially Declares Ainu Indigenous*, *supra* note 368, and fails to refer to Ainu land compensation claims or an official apology. See Resolution to Recognize the Ainu as an Indigenous People, *supra* note 366.

374. An 80-year-old Ainu woman expressed: “I’m glad to learn the resolution [passed, but] I’d also like the government to apologize and make way for the sake of the Ainu people.” Kambayashi, *supra* note 359. Also, the Indigenous Peoples Summit in Ainu Mosir 2008 declared that “[the Japanese government] should issue an official apology to the Ainu people in clear language in a public forum.” *Id.*

375. See e.g. Onishi, *Recognition for a People Who Faded as Japan Grew*, *supra* note 370 (quoting Yasuko Yamamichi, who runs an Ainu language school, refer to the recognition as “empty”).

376. *A People, At Last*, ECONOMIST, July 10, 2008, available at [http://www.economist.com/world/asia/displaystory.cfm?story\\_id=11707607](http://www.economist.com/world/asia/displaystory.cfm?story_id=11707607).

377. Masami Ito, *Panel Begins Process To Rectify Ainu Woes*, JAPANTIMES, Aug. 12, 2008, available at <http://search.japantimes.co.jp/cgi-bin/nn20080812a4.html>.

378. Associated Press, *Panel to Propose Measures to Enable Ainu ‘to Retain Honor’*, available at [http://www.breitbart.com/article.php?id=D92G0VQG1&show\\_article=1](http://www.breitbart.com/article.php?id=D92G0VQG1&show_article=1) (last visited Oct. 7, 2009).

379. Ito, *Panel Begins Process*, *supra* note 377; *Panel Urges Laws to Assist Ainu, Preserve*

The Panel's eight members were indeed eminent persons.<sup>380</sup> Its head was Koji Sato, a Kyoto University constitutional law professor and member of the House of Representatives.<sup>381</sup> Sato declared that the Panel would emphasize understanding "accurately what the Ainu people truly wish for"<sup>382</sup> and that "the most important starting point is to have the public accurately understand the history and grasp the situation of the Ainu."<sup>383</sup> As a result of colonial Japan's suppression of Ainu culture and confiscation of Ainu lands, the Japanese public knows little about Ainu or its history of injustice. Narratives of a singular homogenous Wajin culture have persisted.<sup>384</sup>

Why, then, did the parliament's Resolution recognizing Ainu indigeneity, with its potential and problems, suddenly emerge in the summer of 2008? Why did the government appoint eminent lawyers, educators, politicians and cultural specialists, all of whom were instructed

*Culture*, JAPANTIMES, July 30, 2009, available at <http://search.japantimes.co.jp/cgi-bin/nn20090730a4.html>.

380. Among the other Panel members, Tadashi Kato, executive director of the Hokkaidō Utari Kyōkai (Ainu Association of Hokkaidō) that drafted the Ainu Shinpō 25 years earlier, is the only Ainu. He views the Resolution as a big "first step." See Onishi, *Recognition for a People Who Faded as Japan Grew*, *supra* note 370. Hokkaidō governor Harumi Takahashi will likely bear responsibility for implementing any forthcoming government recommendations. See The Foreign Correspondents' Club of Japan, <http://www.e-fccj.com/node/2841> (last visited Oct. 7, 2009). Professor Teruki Tsunemoto, director of the newly-established Hokkaidō University's Center for Ainu and Indigenous Studies, is a highly-regarded constitutional law scholar. *Id.*

381. See The Judicial Reform Council, [http://www.kantei.go.jp/foreign/koizumipphoto/2001/06/12/shihouseido\\_e.html](http://www.kantei.go.jp/foreign/koizumipphoto/2001/06/12/shihouseido_e.html) (last visited Oct. 7, 2009). See also Official Webpage of Koji Sato, <http://www.satoukouji.com> (last visited Oct. 7, 2009). Sato recently played a major role in the Japanese judicial system reforms. *Id.*

382. *Panel to Propose Measures*, *supra* note 378.

383. Ito, *Panel Begins Process to Rectify Ainu Woes*, *supra* note 377. Specifically, during the Meiji period, the Japanese colonized Hokkaidō and the northern islands and tried to force the Ainu to assimilate as "Japanese." The Ainu were forbidden to speak their own language, restricted in their hunting and fishing, banned from wearing traditional earrings and facial tattooing, and eventually lost much of their land. See Levin, *Essential Commodities*, *supra* note 23, at 435-38, 464; Onishi, *Recognition for a People Who Faded as Japan Grew*, *supra* note 370; Ito, *Diet Officially Declares Ainu Indigenous*, *supra* note 368.

As a result, many Ainu had to hide their ethnicity in order to avoid discrimination and grew up ashamed of their background. See Kambayashi, *supra* note 359. Ainu family, social, and cultural traditions were destroyed, and many Ainu fell into debt, alcoholism, and committed suicide. Japanese and Americans who were aware of the Ainu often referred to the Ainu as a "dying" or "disappearing" race. See Rice, *supra* note 256, at 5.

384. Interview with Ken'ichi Ochiai, *supra* note 298. See also Levin, *Essential Commodities*, *supra* note 23, at 467 ("[The current Culture Promotion Law] rejected all aspects of the New Ainu Law pertaining to issues such as self-determination, special representation, access to natural resources, economic autonomy, and anti-discrimination, leaving only the thinnest crescent of cultural promotion and dissemination of information about the Ainu to the Wajin Japanese.") (emphasis added).

The Panel's report reflected many of these concerns, asserting that the Japanese government bore a "strong responsibility" for restoring Ainu culture and suggesting remedial legislation, such as utilizing natural resources in a way that would facilitate traditional Ainu practices, expanding the scope of government aid to the Ainu beyond Hokkaido, and establishing public parks to increase the Japanese public's knowledge and appreciation of the Ainu. *Panel Urges Laws to Assist Ainu*, *supra* note 379.

to employ the lens of the U.N. Declaration of Rights of Indigenous Peoples in crafting what may be effective reparatory initiatives for the Ainu? Was their appointment a step toward genuine social healing? Or was it more a government ploy to dampen the kind of human rights criticism that occurred before the G8 Summit – criticism that might further damage Japan’s international stature at a time when Japan is endeavoring to expand its worldwide influence in the face of perceived threats to its economy and security? Or was it a reflection of enlightened self-interest (an interest convergence) – a sense that human rights norms, even if unenforceable in courts of law, are transforming what societies are coming to view as right and just and are beginning to shape international perceptions of what constitutes a genuine democracy committed to human rights? Or a bit of both?

Hideaki Uemura, an expert on indigenous peoples’ rights, perceived that Japan’s quest for an influential international voice pushed policymakers to dramatically alter their approach to the Ainu.<sup>385</sup> Japan, “which aspires to a permanent seat on the United Nations Security Council, has already come to an international stage where they have to acknowledge [the fact that they denied diversity and multiculturalism].”<sup>386</sup> According to Panel Expert Professor Tsunemoto, the G8 Summit provided the needed political leverage for Ainu advocates.<sup>387</sup> Other observers noted that “Japan did not want any protests to detract from the high-profile gathering”<sup>388</sup> and that “the Ainu’s lack of recognition could have proved embarrassing for Japan’s government.”<sup>389</sup>

Human rights pressure also appeared to influence Japan’s actions. The United Nations<sup>390</sup> named 1995-2004 the “International Decade of the World’s Indigenous People”<sup>391</sup> and adopted the Declaration of Rights of Indigenous Peoples in 2007. The Declaration, which Japan supported with reservations, established each country’s obligation to accept responsibility for the human rights harms it inflicted on indigenous peoples, and it did so

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385. See Kambayashi, *supra* note 359, at 1. See also Larson, Johnson & Murphy, *supra* note 359, at 72 (the government “was taking an increasing interest in Ainu issues because ‘they recognized the international circumstances about indigenous people.’”).

386. See Kambayashi, *supra* note 359, at 1.

387. Philippa Fogarty, *Recognition At Last For Japan’s Ainu*, BBC NEWS, Jun. 6, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7437244.stm> (last visited Oct. 7, 2009).

388. Kambayashi, *supra* note 359, at 2.

389. See Onishi, *Recognition for a People Who Faded as Japan Grew*, *supra* note 370.

390. According to Japan’s Asahi Shimbun’s editorial, “[t]he Ainu have long demanded that the government recognize their rights as an indigenous people. But it wasn’t until the United Nations adopted the Declaration on the Rights of Indigenous Peoples last September that this campaign started to gain momentum.” Associated Press, *Japanese Editorial Excerpts*, [http://www.breitbart.com/article.php?id=D9384JRG1&show\\_article=1](http://www.breitbart.com/article.php?id=D9384JRG1&show_article=1) (Translated editorial excerpts from the Japanese-language Asahi Shimbun’s editorial published June 4) (last visited Oct. 7, 2009).

391. Rice, *supra* note 256, at 8.

within a framework of reparatory justice.<sup>392</sup> Ainu advocates and supporting international organizations decried Japan's hypocrisy in publicly supporting the Declaration on the Rights of Indigenous Peoples while refusing to acknowledge Ainu indigeneity and commit to reparatory action.<sup>393</sup> The pressure mounted.

In reaction, Japan's parliament passed its 2008 Resolution recognizing Ainu indigeneity and called into play reparatory remedies for injustice. Or did it? Although citing the Declaration on the Rights of Indigenous Peoples, Japan's leaders disavowed its direct applicability to the Ainu. Repeating Japan's reservation in signing the Declaration, they observed that the Declaration embraces group rights while Japan's Constitution protects only individual rights.<sup>394</sup> In doing so, the political leaders raised prospects of Japan by later claiming that the Ainu are not entitled to the Declaration's self-determination remedies because the Ainu are not "that kind of indigenous people." But this speculation may never materialize in the Advisory Panel's anticipated comprehensive reparatory recommendations that are to be guided by the Declaration.<sup>395</sup>

How do justice advocates and governments simultaneously guide and assess the Ainu-Japan path forward? In concept and on the ground? These questions return us to the significance of analytical tools for guiding and critiquing redress initiatives.

#### *D. A Strategic Path Toward Social Healing*

The Social Healing Through Justice framework enables Ainu justice advocates and supporters to strategically assert, and policymakers to grasp, that despite intermittent progress, the attempt to repair the damage to the Ainu people and to Japanese society itself to foster reconciliation, will ultimately be judged unsatisfactory or even a failure unless the Japanese

392. See *supra* Section III.C.

393. See Jean M. Downey, *Ainu Leader Tadashi Kato on the UN's 2007 Resolution on Indigenous Rights*, Oct. 15, 2007, KJELD, <http://www.ikjeld.com/japannews/00000525.php> (describing the Japanese government's stance as a "slippery take which allows Japan to align with the high ground of the Declaration, but also to skirt the issue of its own policies towards the Ainu people").

394. See *id.*; Interview with Ken'ichi Ochiai, *supra* note 298.

395. Another factor contributing to the Resolution may have been the Japan-Russia dispute over the four Kuril Islands - Kunashiri, Etorofu, Shikotan and Habomai - known in Japan as the "Northern Territories." Rice, *supra* note 256, at 10. Neither Japan nor Russia denies that the Ainu were the first to live on the islands, but both governments claim the islands without reference to the Ainu. See Fogarty, *supra* note 387. However, experts now believe that the Ainu may give Japan a strategic advantage over Russia. Because "the Russian government has indicated a willingness to negotiate with Ainu in returning the southern Kuriles to Ainu as the indigenous inhabitants of the islands," the Japanese government "would gain leverage in bargaining with Russia for transfer of the islands if Ainu are granted status as Japan's Indigenous People." Ann-Elise Lewallen, *Indigenous at Last! Ainu Grassroots Organizing and the Indigenous Peoples Summit in Ainu Mosir*, THE ASIAN PACIFIC JOURNAL: JAPANFOCUS, Vol. 48-6-08 (2008), available at [http://www.japanfocus.org/-ann\\_elise\\_lewallen/2971](http://www.japanfocus.org/-ann_elise_lewallen/2971)

government and people undertake significant additional *reconstructive* and *reparatory* steps soon.

Equally important, the framework predicts that if Japan's Ainu social healing efforts fail, and Japan's reconciliation/reparations initiatives involving other groups or countries similarly stall or fail,<sup>396</sup> then Japan will have far greater difficulty on the global stage to claim full standing as a democracy committed to human rights. It will not be able to fully assert the moral authority needed to become a major player on matters of global security and economic development.<sup>397</sup>

This assessment of Japan's flagging international moral stature as a democracy committed to civil and human rights provides strategic insight into Native Hawaiian and African American redress claims. America's moral standing has been badly damaged worldwide not only by its falsely justified pre-emptive war in Iraq and its human rights abuses in the Abu Ghraib, Guantanamo Bay and secret prisons abroad, but also by its long-standing unredressed civil and human rights violations.<sup>398</sup> It cannot restore its moral authority, the framework suggests, until it recognizes and redresses the injustices.

Social Healing Through Justice also charts a potentially productive future path for the newly-created Japanese Advisory Panel, government policymakers, Ainu advocates and native peoples elsewhere. In short, the Four R's suggest that if the Ainu people and Japan's governments and people are to heal long-standing wounds of injustice—if Japan is to begin to properly claim its commitment to human rights and democracy in the eyes of international communities—then careful future attention is needed to the demands of *recognition* (of Ainu as an indigenous people under the Declaration on the Rights of Indigenous Peoples and of the full range of harms of colonization) and *responsibility* (for remedying those harms in terms of land, culture, economics, and self-governance).

Just as important, successful *reconstruction* and *reparation* measures require the Japanese government to take significant collective actions to change the socioeconomic conditions of Ainu life and to repair the multifaceted harms both to the Ainu people and to Japanese society itself. This may entail accelerating the collaborative search for ancestral Ainu *iwore*

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396. Chinese-Japanese and Korean-Japanese reconciliation efforts concern the atrocities committed during Japan's WWII occupation of Manchuria, the "Rape of Nanking," and the 200,000 sex slaves known as "comfort women." See generally Onuma Yasuaki, *Japanese War Guilt and Postwar Responsibilities of Japan*, 20 BERKELEY J. INT'L L. 600 (2002); Sheu, *Clash of Asia's Titans*, *supra* note 106. See also *Japanese PM Apologises Over War*, BBC NEWS, Apr. 22, 2005, available at <http://news.bbc.co.uk/2/hi/asia-pacific/4471495.stm>.

397. See Yamamoto, Kim & Holden, *American Reparations Theory and Practice*, *supra* note 12, at 52, 72.

398. See Yamamoto, Serrano, & Rodriguez, *African American Reparations*, *supra* note 7, at 1326-27 (describing post-9/11 civil liberties abuses and falling American moral authority).

(communal lands linked to Ainu culture and spirituality)<sup>399</sup> in Birutani and Shiraoi and other places with substantial Ainu populations.<sup>400</sup> It may entail return of those ancestral communal lands as well as the restoration and return of former Ainu forest lands (now uninhabited and owned by the national government).<sup>401</sup> Collective government, business, and private citizen action may also need to create a substantial Ainu economic development fund to foster Ainu self-development and self-reliance—as called for in the Ainu Association of Hokkaidō's *Ainu Shinpō*.<sup>402</sup> This is the very kind of comprehensive, sustained reparatory justice envisioned two and a half decades ago by the Ainu Association and now pushed by a new young generation of Ainu advocates.<sup>403</sup>

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399. Interview with Ken'ichi Ochiai, *supra* note 298. For the Ainu, the indigenous connection to land is summed up with the concept of iwore – literally “backyard.” *Id.* By returning the Ainu to the land, in a sense, these specific provisions allow for economic self-sufficiency, a key to self-determination and ultimately one form of reparation to formerly-colonized indigenous peoples. This is significant, as “indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.” Declaration on the Rights of Indigenous Peoples, *supra* note 136, art. 21.

One Ainu leader notes the desire of Ainu for their historical land, or backyard.

[W]e want land rights. About 120 years ago the Japanese government said that Hokkaidō was a national land and they took it, suddenly. *The Ainu want the land to be given back*— not all the land, just where Ainu used to live. The Japanese government is scared that if they let some people have their land then they will lose the whole of Hokkaidō. But we do not want the whole of Hokkaidō. *We only want those places which belonged to the Ainu.*

Zohel de Ishtar, *Japan's indigenous people claim their rights*, GreenLeft Online, Mar. 11, 1998, <http://www.greenleft.org.au/1998/309/21807> (*emphasis added*).

400. *Id.*

401. *Id.*

402. The Ainu Association of Hokkaidō—the oldest and largest organization representing the Ainu in Japan—aimed to repair the damage of colonization. Operating as a “semi-autonomous sub-entity” of the Hokkaidō Prefectural Government, *see* Levin, *Essential Commodities*, *supra* note 23, at 444 n.87, the Association petitioned that both the Hokkaidō prefectural and the national governments repeal the 1899 Hokkaidō Former Aborigines Protection Act. *See* Ainu Association of Hokkaidō, *A Statement on the Partial Revision of I.L.O. Convention No. 107* (last visited Oct. 7, 2009), available at <ftp://ftp.halcyon.com/pub/FWDP/Eurasia/ainu.txt>. The atrocity also promoted a multifaceted movement to promote mainstream Japanese understanding of the necessity of *reconstruction*—the establishment of new institutions to restore the rights of the Ainu as an indigenous people and enable measures to eliminate racial discrimination and promote cultural education and economic self-sufficiency. *See* Levin, *Essential Commodities*, *supra* note 23, at 442. The Association therefore drafted the path-breaking Ainu self-determination law, the Ainu Shinpō. *See* Ainu Shinpō, *supra* note 339.

The Ainu Shinpō constituted a comprehensive reparatory response to the harms of Japan's northern colonization project. SIDDLE, *supra* note 23, at 181. Specifically, the legislation required: the “elimination of discrimination against the Ainu people,” Ainu Shinpō, *supra* note 339, at Section 1; implementation of “a policy to guarantee seats for Ainu representatives in the National Diet and local assemblies,” *id.* at Section 2; promotion of Ainu culture through education, *see id.* at Section 3; encouragement of “economic independence of the Ainu” through agriculture, fishing, forestry, manufacturing and commercial, and labor policies – in essence, return of land and resources, *id.* at Section 4; establishment of “Self-Reliance Fund of the Ainu People,” *id.* at Section 5; and creation of consultative political bodies for Ainu policies, *id.* at Section 6. Each provision reflected an Ainu view of reparatory justice. Collectively, they called for comprehensive, systemic change in Ainu life and in the relationship of indigenous Ainu to Japan's governments and people.

403. Interview with Ken'ichi Ochiai, *supra* note 298.



In the end, the Hokkaidō government may have the greatest immediate impact. Professor Ko Hasegawa aptly summarizes this. In addition to recognizing the Ainu's collective rights to land and culture and to autonomy, he says, the Japanese governments must "address the Ainu's strained financial condition, guarantee their intellectual property rights on traditional knowledge, set up a foundation to assist their livelihoods, introduce scholarships toward the college education of Ainu youths, and hire Ainu as local government employees."<sup>404</sup> This is the kind of comprehensive, systemic and sustained reconstruction that promotes psychological and spiritual health and at the same time targets social structural transformation. It is the kind of repair that engages communities, organizations, businesses and governments. And it fosters the material change that generates the kind of resonance of "justice done" that fosters social healing—for the Ainu people and for the governments and people of Japan.

## VII. CONCLUDING THOUGHTS: REFRAMING REDRESS

While Japan and the indigenous Ainu embark on the next stage of this now world-watched healing journey, indigenous Chamorus in the American territory of Guam<sup>405</sup> and aborigines in America's neighbor Canada and ally Australia are invoking reparatory justice remedies rooted in human rights.<sup>406</sup> In the United States, African Americans' stalled reparations claims may get kick-started with President Obama in the White House and an increased Democratic Party majority in Congress.<sup>407</sup> Indeed, House Judiciary Chair John Conyers has been waiting since 1989 to hold hearings on his bill for an African American slavery study commission (patterned after the Japanese American internment study commission).<sup>408</sup> The United States Congress recently passed legislation conferring benefits to Filipino World War II veterans and is also considering Japanese Latin

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404. Hasegawa, *supra* note 256, at 7.

405. See generally JULIAN AGUON, *WHAT WE BURY AT NIGHT* (2008) (describing indigenous Chamorro self-determination claims).

406. See *supra* Section II.B. See also Kristl K. Ishikane, Comment, *Korean Sex Slaves' Unfinished Journey for Justice: Reparations from the Japanese Government for the Institutionalized Enslavement and Mass Military Rapes of Korean Women During World War II*, 29 U. HAW. L. REV. 123 (2006) (analyzing the Japanese government's failure to redress the horrific harms of sexual enslavement of Korean women during World War II and the U.S. Congressional resolution urging Japanese redress).

407. See generally BROPHY, *REPARATIONS PRO AND CON*, *supra* note 8; Adjoa Artis, *Truth Matters: A Call for the American Bar Association to Acknowledge Its Past and Make Reparations to African Descendants*, 18 GEO. MASON CIV. RTS. L. J. 51 (2007); Ogletree, *The Current Reparations Debate*, *supra* note 186.

408. See BROPHY, *REPARATIONS PRO AND CON*, *supra* note 8, at 50, 143. Conyers bill, H.R. 40, is reprinted in Appendix 3 of Brophy's book. Conyers has reintroduced H.R. 40 every Congress since 1989. See John Conyers Jr. for Congress, <http://www.johnconyers.com/issues/reparations>.

American reparations claims.<sup>409</sup> Native American land claims persist. And Native Hawaiian redress claims against the United States and the State of Hawai'i are enlivened by formal government commitments to reconciliation.<sup>410</sup> These reparatory justice claims are merging at a time when the United States' stature as a democracy committed to human rights is badly damaged and itself in need of repair.

These redress initiatives and many others worldwide have been influenced in varying ways by the Civil Liberties Act of 1988. Indeed, as Japanese American Redress commemorates its twentieth anniversary,<sup>411</sup> the Act continues to have far-reaching impact.<sup>412</sup> On an individual level, redress for former Japanese American internees was cathartic for many. This Article's Introduction recounts a former internee woman's emotional reaction to redress. The crushing self-doubt had lifted. The apology and reparations had "freed her soul."<sup>413</sup>

Yet, in 1998, on the Act's tenth anniversary, Professor Yamamoto asked, what would be "the long-term societal effects of reparations—the social legacy of Japanese American redress beyond personal benefits?"<sup>414</sup> It is clear that the redress movement provided political and legal insights into the breakdown of democratic checks and balances during national distress. But would societal attitudes change? Would institutions be restructured? Would Japanese American reparations serve to catalyze the redress for others?<sup>415</sup>

It is now also clear that redress did indeed help open national and international eyes to the social value of government redress—whether termed reparations, reconciliation or social healing—and that it helped galvanize new and old redress movements in established democracies, if not by providing a model then by opening the horizon to what might be possible.<sup>416</sup>

In other important respects, the legacy of Japanese American Redress and its place in Asian American Legal Theory is "unfinished business."<sup>417</sup>

409. See American Recovery and Reinvestment Act, Pub. L. No. 111-5, 123 Stat. 115 (2009); See also Filipino Veterans Equity Act of 2008, H.R. 6897, 110th Cong. (2008) (passed by House and received in Senate Sept. 23, 2008); Saito, *Justice Held Hostage*, *supra* note 7 (revisiting reparations claims against the U.S. by Japanese Latin Americans).

410. See *supra* Section IV.

411. See *supra* Introduction.

412. See generally WHEN SORRY ISN'T ENOUGH, *supra* note 9, at 240 (Japanese American redress in the U.S. stimulating movements worldwide for reparations for historic injustice).

413. See *supra* Introduction.

414. Yamamoto, *Racial Reparations*, *supra* note 7, at 478.

415. *Id.* Professor Yamamoto predicted that the legacy of redress would likely turn on how the Japanese American community "engages across Asian ethnic lines" and embraces the efforts of many others to repair the lasting harms of government injustice – in the United States and indeed throughout the world. Yamamoto, *Beyond Redress*, *supra* note 7, at 134.

416. See *supra* Section II.B.

417. Yamamoto, *Beyond Redress*, *supra* note 7, at 131, 134; Yamamoto, *Racial Reparations*, *supra* note 7, at 478.

Two views of redress collide. From one vantage point, redress for former internees shows that wrongs against a racial group in the U.S. can be made right. Indeed, redress in the form of an apology, symbolic payment, and a public education fund generated a genuine measure of healing and also enabled the United States to demonstrate a commitment to reparatory justice.<sup>418</sup> From another perspective, political opportunism and conservative backlash have cast shadows over even the most salutary present-day redress efforts<sup>419</sup> and, hence, over the meaning of Japanese American Redress itself. Is it possible that Japanese American redress “may further the general interests [of America] . . . and the government structure that supports it,” while creating only an “illusion of progress”?<sup>420</sup> The post-9/11 government subversion of civil liberties under the broadly exaggerated claim of national security, particularly the religious and racial scapegoating of Arab Americans, lend some support for this view.<sup>421</sup>

These colliding views signal the need for reassessing our understandings of redress in light of domestic and international experiences. What emerges is this: democracies deeply involved in widely varying redress initiatives need an analytical framework for redress that both guides and critiques contemporary social healing efforts. The Social Healing Through Justice framework offered here<sup>422</sup> expands and recasts the redress dimension of Asian American Legal Theory.<sup>423</sup> It coalesces multidisciplinary insights into group and societal healing by drawing upon American and global redress initiatives aimed at repairing the continuing harms of historic injustice. It provides insights into the ways that evolving human rights principles are remaking public understandings of the multiple dimensions of reparatory justice for systemic harms—the psychological, economic, cultural, and institutional.<sup>424</sup>

The Social Healing Through Justice critique of United States-Native Hawaiian and Japan-Ainu redress initiatives<sup>425</sup> sheds broader light on redress. First, it illuminates the failure of democratic governments’ efforts to repair the long-term systemic damage when those efforts focus mainly on “compensation,” without attention to the psychological, cultural, and institutional aspects of reparatory justice.<sup>426</sup> Second, it reveals the salutary potential of social healing initiatives as well as the emptiness of insincere

418. See Yamamoto, *Racial Reparations*, *supra* note 7, at 478.

419. See *supra* Sections II.A and II.B.

420. Yamamoto, *Social Meanings of Redress*, *supra* note 1, at 227, 229.

421. See generally Volpp, *supra* note 50; Akram & Johnson, *supra* note 50.

422. See *supra* Section III.

423. See generally DALTON, *supra* note 20 (describing how an emphasis on healing has entered civil rights discourse); Yamamoto, *Race Apologies*, *supra* note 8 (describing the significance of social healing in international human rights landscape).

424. See *supra* Sections IV.C and IV.D.

425. See *supra* Sections IV and V.

426. *Id.*

apologies and unfulfilled redress promises.<sup>427</sup> Finally, and most broadly, the assessment of Native Hawaiian-United States reconciliation efforts and Ainu-Japan relations provides strategic insight into how a country's geopolitical interests and concerns about perceived legitimacy as a democracy committed to human rights influence the country's future actions on its commitment to social healing.<sup>428</sup>

The stakes are high. The time is ripe to rethink reparatory justice and reframe redress.

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427. *Id.*

428. *Id.*